LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 20 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 255

THE CITIES OF CANTON, CLEVELAND, and MASSILLON, OHIO,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO, and THE EAST OHIO GAS COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

BRONIS J. KLEMENTOWICZ,
Director of Law,
JAMES L. HARKINS, JR.,
Assistant Director of Law,
204 City Hall,
601 Lakeside Avenue, N. W.,
Cleveland, Ohio 44114,
HAROLD E. DEHOFF,
City Solicitor of Canton,
City Hall, Canton, Ohio,
VIRGIL MUSSER,
City Solicitor of Massillon,
City Hall, Massillon, Ohio,
Attorneys for Petitioners.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-6647

TABLE OF CONTENTS.

Opinions Below ---- 1

Jurisdiction ---- 2

Question Presented ---- 3

Constitutional Provisions Involved ---- 3

Statement of the Case ---- 3

The Commission Adopted Property Valuations Attributed to a Mr. Hampton Who Is a Complete Stranger to the Record of This Case ---- 4

The Valuation Adopted by the Commission Was Not Supported by Any Competent Testimony 5

The Petitioners Introduced Extensive Evidence as to the Value of the Company's Property ---- 8

The Petitioners Made Timely Objections ---- 9

Petitioners' Position ---- 11

Reasons for Granting the Writ ---- 12

I. The Right of the Ratepayer to the Protection of the Fourteenth Amendment Against Arbitrary Acts by State Regulatory Bodies Is a Matter of Extreme General Importance Which Has Never Been Decided by This Court ---- 12

II. The Ratepayers Seek the Equality of Treatment Afforded by the Fourteenth Amendment ---- 13

III. The Commission Acted Contrary to the Holding of This Court in Ohio Bell Telephone Co. v. Commission, 301 U. S. 292 ---- 13

Conclusion ---- 15

Appendices:

A. Findings and Order of the Public Utilities Commission, November 20, 1964 ---- 16

Exhibit A. Interstate Gas Adjustment and Refund Clause ---------- 56

B. Findings and Order of the Public Utilities Commission, November 23, 1964 ---------- 59

C. Opinion of the Supreme Court of Ohio ---------- 60

D-1. Judgment of the Supreme Court of Ohio ---- 72

D-2. Mandate of the Supreme Court of Ohio ---- 72

E. Article From the American Engineer, May, 1965 ---------- 73

TABLE OF AUTHORITIES.

Cases.

Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia, 262 U. S. 679 (1923) ---------- 13

Ohio Bell Telephone Company v. P. U. C. O., 301 U. S. 292, 57 S. Ct. 724 (1937) ---------- 3, 8, 13, 14

Texts.

Wigmore on Evidence, third ed. (1940), Volume 5, Chapter 46, Section 1367, page 29 ---------- 8

Constitution and Statutes.

Constitution of the United States, 14th Amendment ---------- 2, 3, 12, 13, 14

28 U. S. C. Sec. 1257(3) ---------- 2

In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. ----------.

THE CITIES OF CANTON, CLEVELAND, and MASSILLON, OHIO,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO, and THE EAST OHIO GAS COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

The petitioners pray that this Court issue a writ of certiorari to review the journal entry of the Supreme Court of the State of Ohio entered on the twenty-third day of March, 1966, in the case of the Cities of Akron, Canton, Cleveland, and Massillon, Ohio, Appellants, vs. Public Utilities Commission of Ohio, Appellee, The East Ohio Gas Company, intervening Apellee, on appeal from the Public Utilities Commission of Ohio.

OPINIONS BELOW.

The Public Utilities Commission of Ohio in its "Findings and Order," dated November 20, 1964, authorized The East Ohio Gas Company to increase its charges to its 800,000 customers in North East Ohio by roughly $19,000,000 per year. The Commission's "Findings and

Order," of November 20, 1964, and November 23, 1964, are attached hereto respectively as Appendix A and Appendix B.

The opinion of the Supreme Court of the State of Ohio affirming the decision of the Public Utilities Commission (hereinafter referred to as the "Commission") is attached hereto as Appendix C. The Court's opinion was reported at 5 Ohio State 2d 237 (1966).

JURISDICTION.

Petitioner seeks a review by this Court of the journal entry of the Supreme Court of Ohio of March 23, 1966, in the above mentioned case. The journal entry has been appended hereto as Appendix D.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257 (3), since the petitioners and those whom they represent were deprived by the Commission and the Supreme Court of Ohio of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED.

The fundamental question of extreme national importance raised by this petition for a writ of certiorari is:

> Are rate payers entitled to due process of law in the setting of rates by State regulatory bodies?

CONSTITUTIONAL PROVISIONS INVOLVED.

No statutes are involved in this case. The only constitutional provision involved is Section 1 of the Fourteenth Amendment to the Federal Constitution which is as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

Decades ago in less prosperous times the privately owned utilities came before this Court and asked for the protection of the Fourteenth Amendment to our Federal Constitution against arbitrary action on the part of state regulatory bodies including the Commission. This Court determined that the utilities were entitled to that protection. *Ohio Bell Telephone Company v. Commission*, 301 U. S. 292.

The general prosperity of the last quarter of a century has caused the Commission to lose its sense of purpose. Now it has become insensitive to the rights of the ratepayer. Petitioners appear before this Court seeking the

same protection against arbitrary action on the part of the Commission as this Court has granted the utilities. The Commission by its arbitrary action has cost The East Ohio Gas Company's ratepayers over $19,000,000 per year.

The Supreme Court has never determined whether the ratepayer is entitled to the protection of the Fourteenth Amendment against arbitrary action on the part of state regulatory bodies. The importance of this issue on a nationwide basis is staggering even in this era in which we have become so accustomed to astronomical sums. This issue becomes doubly important in view of the current necessity of combatting inflation through restraining rate increases in basic industries.

The Commission Adopted Property Valuations Attributed to a Mr. Hampton Who Is a Complete Stranger to the Record of This Case.

The Commission for rate making purposes utilized a valuation attributed to a *Mr. Paul R. Hampton,* who *neither gave any direct testimony nor was made available for cross-examination.* The Commission did this by adopting Commission Exhibit 4 (page 20 of the Commission's "Findings and Order" of November 20, 1964) which in turn is based entirely upon the valuations contained in Exhibit II-A (page 9049 of the transcript). Exhibit II-A is the engineering section of the Staff Report of the Commission's staff in this case. All of the valuations in the Staff Report and therefore all of the valuations adopted by the Commission were attributed to Mr. Hampton (page 9028 of the transcript).

There is a difference of over $114,000,000 between the valuations submitted by the Petitioners through their experts and the unsupported valuation attributed to the phantom Hampton. By choosing the higher Hampton val-

uation the Commission deprived the Petitioners of due process of law. At the 6 1/4% rate of return allowed by the Commission and a composite tax rate of 50% for both state and federal taxes, this excessive valuation costs the ratepayers roughly $14,000,000 per year.

The Valuation Adopted by the Commission Was Not Supported by Any Competent Testimony.

The *only testimonial support* for the cost of new production estimate utilized by the Commission *was from Mr. Patton.* At the time of his testimony Mr. Patton had been with the Commission only two months (Tr. 9075). Mr. Patton had never made a valuation of gas distribution property (Tr. 9079). Mr. Patton only could testify that he had checked Mr. Hampton's work papers to test whether Mr. Hampton had been consistent and mathematically accurate. Thus *no one* ever testified concerning the substantive judgments which were the basis of the valuation adopted by the Commission.

Mr. Patton did not support the judgment determinations attributed to Mr. Hampton. In fact, Mr. Patton did not and could not be expected to understand the basis for determining the allocations, choice of trend factors, and the other judgments involved in the cost of new production estimate attributed to Mr. Hampton. For instance, on page 9127 of the record, Mr. Patton stated that the allocation of 18% of the general property as City Gate property was worked out *"mutually between the Company and the Staff* and somewhere in the papers, as I say, there was a formula used. How well it was adhered to, I do not know." (Emphasis added.) On page 9028 of the record, he testified that

> *"Due to the fact that Mr. Hampton,* the Chief Engineer, who prepared the Report, *made final disposal of the*

data turned in by the Staff and did this in accordance with his engineering judgment, it was naturally difficult to determine the exact basis of some of these engineering judgments, but I was able to trace and find the final result of this in the working papers." (Emphasis added.)

It is evident from his testimony on page 9117 of the record that the judgments attributed to Mr. Hampton could only be supported by Mr. Patton's *feelings* about what Mr. Hampton *felt;* viz,

"* * * It was *felt* in checking Mr. Hampton's notes, and I would have to pull them, that he *felt* in that account there was skilled labor of 25.5 percent, which is set out in the Handy-Whitman tables as gas labor; there was unskilled labor of 17 percent and there was equipment of 57.7—57.5 percent." (Emphasis added.)

MM. Carney, Holzer, and Larimer of the Engineering Staff of the Commission appeared to testify about their part in the determination of the depreciation estimates. Mr. Patton made the unfortunate error of stating that these gentlemen exercised independent judgment (Tr. 9090-9093) about the depreciation of some of the property they inspected. However, Mr. Patton admitted that *they exercised no independent judgment about the pipe* (Tr. 9090-3), which constitutes the preponderance of the property involved in this case.

It would be a useless exercise for us to attempt to show from the record that MM. Carney, Holzer, and Larimer *did not* exercise any independent judgment at any time, since it is clearly evident from the record that the final determination of the depreciation estimates for all the property was made by Mr. Hampton, who "* * * made final disposal of the data turned in by the Staff.

* * *." (Tr. 9028). As Mr. Carney stated on page 9445 of the record, "Mr. Hampton is responsible for the final analysis of everything I have done, throughout all of these accounts." Mr. Holzer, on page 9470 of the record, replied "I do not know." to the following question by Mr. White:

> "Then directing your attention to Page 6 and Page 8, respectively, of Commission Exhibit No. 2-A, would you say, as you did with respect to Vehicles, that you don't know how Mr. Hampton arrived at these final percentages that he shows as the percent condition for these Accounts that you inspected, other than Vehicles?"

The valuation adopted by the Commission is based upon the use of published trend factors (page 9 of the Commission's "Findings and Order" of November 20, 1964). The bases for most of the published trend factors including those used for the valuation of the pipe *are trade secrets; they are not susceptible to check, verification, challenge, or review.* The Petitioners had no means to discover whether the judgment determinations made in the development of these trends were reasonable or unreasonable. The Petitioners had no opportunity to test whether any of these trends were really applicable for the purposes for which they were used by Mr. Hampton. There was no way for the Petitioners to determine whether these trends were developed by people who were competent. This is a very important consideration in view of the fact that the Commission rejected on the ground of competency the Petitioners' price-out of the material cost of the pipe submitted by Mr. Honaker (Tr. 11,138-40).

In reality the Petitioners were denied the right to cross-examine anyone about the valuation adopted by the Commission. There is no real difference between making available witnesses who know nothing about the valuation

in question and actually presenting no witnesses at all. In either event, the Petitioners were denied *an opportunity* to make an effective cross-examination. The Commission would not have acted any more arbitrarily if it had gone completely outside of the record to adopt some other valuation, as it did in *Ohio Bell Telephone Company v. P. U. C. O.*, 301 U. S. 292, 57 S. Ct. 724 (1937).

The men really responsible for the valuation adopted by the Commission never graced the record with their presence. As has already been emphasized, Mr. Hampton was not available at the time of the hearings. The people who developed the trends utilized in the valuation adopted by the Commission are unknown to the record. The Petitioners were effectively denied the right to cross-examine, which right is well described by Wigmore as "* * * the greatest legal engine ever invented for the discovery of truth. * * *" (*Wigmore on Evidence*, third ed. (1940), Volume 5, Chapter 46, Section 1367, page 29). The Commission's decision to adopt the valuation attributed to Mr. Hampton was arbitrary, capricious, and unlawful and was a denial to the Petitioners of due process of law under the Fourteenth Amendment to the Federal Constitution (hereinafter referred to as the "Fourteenth Amendment").

The Petitioners Introduced Extensive Evidence as to the Value of the Company's Property.

The Petitioners spent over $100,000 in studies by some of the nation's leading experts as to the value of the pipe of The East Ohio Gas Company (hereinafter referred to as the "Company"). There were two independent estimates for both the material value of the pipe and the cost to install it. There were two independent estimates of the condition of the Company's pipe. In total we intro-

duced seven witnesses on the subject of valuation. Every one of our witnesses gave direct testimony. All of them were presented for cross-examination.

Our valuations were prepared by people like Mr. C. Maxwell Stanley, President of the Stanley Engineering Company. Mr Stanley is a major industrialist and an engineer with a world-wide practice. He has been awarded many national and international honors in the field of engineering and is the author of over sixty articles on various engineering subjects (Tr. 10,529). Mr. Stanley's most recent award was the 1965 NSPE Award for outstanding service to the engineering profession by the National Society of Professional Engineers (Appendix E). Mr. Stanley is a registered engineer in seventeen states and holds a National Bureau Certificate (Tr. 10,529).

The Petitioners introduced many other equally qualified experts. Both their testimony and exhibits were detailed and exhaustive. A partial listing of our exhibits would be Cities Exhibits D, E, J, K, L, M, N, O, P, U, CC, and QQ.

The Petitioners Made Timely Objections.

The Petitioners were vigorous in their objections to the admission into evidence of both the "Engineering Report" of the Staff Report and the workpapers attributed to Mr. Hampton (Tr. 9643-50). The Petitioners adopted as their own (Tr. 9647-50) the following remarks made by Mr. White for Akron on pages 9644-6 of the record:

> "Furthermore, insofar as the Engineering Section of the Report is concerned there has been no valid testimony in substantiation of any of the figures that are used in the Engineering Section. Mr. Hampton, who, according to Mr. Patton, was a man who exercised the ultimate and final judgment concerning not

only the reproduction cost new figures, that is, the use of certain trends in the weightings as between those various trends, of course, was not here to testify.

"Also insofar as the depreciation is concerned we find the situation that Account No. 333.1-Field Lines, 343-Underground Storage Plant, 343.3-Transmission Mains, 359-Distribution Mains, 361.11-Services, Low Pressure, 361.12-Services, Intermediate Pressure, and 361.13-Services, Special, are completely unsupported with respect to depreciation.

"All of the upground property—there was—a substantial part of it—there was some testimony by various members of the Commission's Staff, however, in each case, with the possible exception of that property which was inspected by the Witness Holzer, in each case the ultimate determination, the ultimate judgment as to the percent condition was Mr. Hampton's judgment.

"We also have, by the statement of Mr. Patton himself, that the property in 354.1, Compressor Station Equipment, 354.21, Meters, Gauges and Measuring Accessories, 354.22, Measuring and Regulating Station Equipment, and 355, Other Equipment Odorization, and this last group I mentioned totals, according to the Engineering Report, some $11,390,000 which is unsupported completely with respect to depreciation. According to Mr. Patton it was either Mr. Hampton or Mr. Miller who made the investigation and neither—he didn't know who, but neither of them, of course, was here to testify.

"Therefore, this report, this Engineering Report with respect to depreciation is the type of a report that depends upon—the validity of which depends upon engineering judgment. *It depends upon expert opinion and there has been no expert opinion here. That is no one that anyone can cross-examine. It is as though the whole case was submitted on the basis*

of a piece of paper and because it was a piece of paper filed with the Commission, then for some reason it is blessed. Since this is expert opinions, since this is expert judgment, expert judgment, it has entered into all of these depreciation determinations, there isn't any expert judgment that appeared here on the stand to state how it was done and to stand cross-examination.

"Therefore, insofar as the Engineering Report, for any purpose at least concerning the determination of reproduction cost new or reproduction cost new less depreciation, there is no support whatever.

"Consequently, I believe as a document it should not be admitted into evidence." (Emphasis added.)

The Petitioners in their "Petition of the Cities of Canton, Cleveland and Massillon for Reopening, Rehearing, and Reconsideration" of December 18, 1964, pointed out to the Commission this denial of due process of law, but, apparently, the Commission was not familiar with the rudiments of equitable treatment required by the Fourteenth Amendment to the Federal Constitution, which perhaps explains the state of our record.

The Petitioners cited this error in their notice of appeal to the Supreme Court of Ohio. This error was argued at great length in our briefs before the Supreme Court of Ohio.

Petitioners' Position.

The Petitioners prosecute this case both as ratepayers and as representatives of most of the ratepayers affected by the Commission's decision.

REASONS FOR GRANTING THE WRIT.

I.

The Right of the Ratepayer to the Protection of the Fourteenth Amendment Against Arbitrary Acts by State Regulatory Bodies Is a Matter of Extreme General Importance Which Has Never Been Decided by This Court.

Each year ratepayers in Ohio pay many hundreds of millions of dollars to privately owned electric, gas, telephone, water, and steam utilities in accordance with rates set by the Commission. The national total is over 20 billion dollars per year. The services provided by these utilities are necessities of life to the huge preponderance of people in our country. The rates set by State regulatory bodies for privately owned utilities have a major impact upon the nation's economy.

Unfortunately the complexities of ratemaking have inclined the Supreme Court of Ohio to accept the most arbitrary of acts by the Commission. Counsel for the Commission have reflected this state of affairs by arguing that the Petitioners which represent the consumers are not entitled to due process of law. The very first subtitle to argument I of the Commission's brief before the Supreme Court of Ohio is *"The Cities Are Not Entitled to Due Process of Law."* The Company is even stronger in its assertions in this regard.

Petitioners can no longer afford to spend hundreds of thousands of dollars to protect their citizens from the loss of countless millions of dollars, if we can not reasonably hope to receive due process of law. We should have this question answered now. This Court has never decided whether the ratepayer is entitled to due process of law under the Fourteenth Amendment in the setting of rates by State regulatory bodies.

II.

The Ratepayers Seek the Equality of Treatment Afforded by the Fourteenth Amendment.

The Supreme Court of the United States has upon many occasions granted the protection of the Fourteenth Amendment to privately owned utilities against arbitrary action by State regulatory bodies, *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 262 U. S. 679, 683 (1923). It would manifestly be unfair to accord this protection to the utilities and deny it to the ratepayer.

III.

The Commission Acted Contrary to the Holding of This Court in Ohio Bell Telephone Co. v. Commission, 301 U. S. 292.

The Supreme Court of the United States in *Ohio Bell Telephone Co. v. Commission*, 301 U. S. 292, held that the Ohio Bell Telephone Company was denied due process of law by the Commission, when it took administrative notice of published trend factors for property valuation purposes after the case had been submitted for decision.

Paragraphs eight through ten of the syllabus of the Supreme Court of the United States in the *Bell* case are of signal importance to this case.

> "8. Under the statutes of Ohio no provision is made for a review of the order of the Public Utilities Commission by a separate or independent suit. The sole method of review is by petition in error to the Supreme Court of the State, which considers both the law and the facts upon the record made below, and not upon new evidence. If, as in this case, that court merely accepts findings of the commission attributed to judicial notice and unsupported by any

known or knowable evidence, judicial review is denied. p. 303.

"9. In view of the power and discretion reposed in regulatory commissions, the inexorable safeguard of a fair and open hearing must be maintained in its integrity in their proceedings. p. 304.

"10. The right to such a hearing is one of the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement. There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored. p. 304."

There is no virtual difference between adopting a valuation predicated upon a valuation attributed to the phantom Hampton that is supposedly based in large part upon published trend factors which in turn are beyond any opportunity for impeachment as in the instant case and just taking administrative notice of other published trend factors after the case had been submitted as in the *Bell* case. Both procedures resulted in the denial of any real opportunity to conduct an effective cross-examination. Both procedures lack "* * * the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement * * *" (Tenth paragraph to the Syllabus of the *Bell* case).

CONCLUSION.

WHEREFORE, the Petitioners pray that a writ of certiorari directed to the Supreme Court of the State of Ohio may issue under the seal of this Honorable Court in this cause and that upon such review the judgment of the Supreme Court of Ohio, entered on March 23, 1966, and the "Findings and Order" of the Commission of November 20, 1964, be vacated, reversed, and set aside and that this case be remanded to the Supreme Court of Ohio with instructions to proceed in accordance with the rulings of this Court.

Respectfully submitted,

BRONIS J. KLEMENTOWICZ,
Director of Law of Cleveland,
City Hall, Cleveland, Ohio,

JAMES L. HARKINS, JR.,
Assistant Director of Law,
City Hall, Cleveland, Ohio,

HAROLD E. DEHOFF,
City Solicitor of Canton,
City Hall, Canton, Ohio,

VIRGIL MUSSER,
City Solicitor of Massillon,
City Hall, Massillon, Ohio,
Attorneys for Petitioners.

APPENDIX A.

(1)

FINDINGS AND ORDER OF THE PUBLIC UTILITIES COMMISSION.

(Filed November 20, 1964.)

The Commission coming now to final consideration of the above entitled application, the testimony and exhibits introduced at the public hearings, including the staff report issued pursuant to Section 4909.19 of the Revised Code, and being otherwise fully advised in the premises and in compliance with statutes provided, hereby renders its Finding and Order.

HISTORY OF THE PROCEEDING.

On August 1, 1961, The East Ohio Gas Company filed with this Commission an application seeking authorization to increase rates and charges for the sale of natural gas by it in the area set forth in the application and, in accordance with Section 4909.18 of the Revised Code, applicant, The East Ohio Gas Company, filed with its application certain exhibits as required by law, namely:

Exhibit 1. Existing schedules of rates for gas supplied for other than industrial and summer air conditioning purposes.

Exhibit 2. Existing schedules of rates for gas supplied for industrial purposes.

Exhibit 3. Existing schedules of rates for gas supplied for summer air conditioning purposes.

Exhibit 4. Proposed schedules of rates for gas supplied for other than industrial and summer air conditioning purposes.

Exhibit 5. Proposed schedules of rates for gas supplied for industrial purposes.

Exhibit 6. Proposed schedules of rates for gas supplied for summer air conditioning purposes.

Exhibit A. Detailed inventory and appraisal of property as of December 31, 1960 used and useful in rendering the service referred to in the application.

Volume I—Detailed Inventory.

Volume II—Appraisal.

Exhibit B. Complete Operating Statement for the fiscal year ending May 31, 1961 showing detail of all revenues and expenses.

Exhibit C. A statement of income and expense anticipated for the year 1962 under the application filed.

Also received on August 1, 1961 was a proposed form of notice to be published by The East Ohio Gas Company pursuant to Ohio Revised Code Section 4909.19. Subsequently, on—:

August 18, 1961. The applicant filed an amended suggested form of legal notice.

(2) August 22, 1961. Entry was issued authorizing publication of legal notice and served to counsel for applicant.

August 28, 1961. Cities of Akron, Cleveland, and Massillon, for themselves and on behalf of other municipalities, filed a motion for an order dismissing application for the reason that it was prematurely filed.

August 28, 1961. Cities of Akron, Cleveland, and Massillon filed brief in support of above motion.

September 14, 1961. City of Barberton, Ohio, filed resolution opposing application.

September 15, 1961. The East Ohio Gas Company filed brief in opposition to above motion to dismiss.

November 2, 1961. Finding and Order issued overruling cities' motion to dismiss application, with a dissent by Miss McGovern. Service of order was duly made according to law.

November 13, 1961. Certification received from East Ohio Gas Company of service on various municipalities of notice of termination of ordinances.

March 15, 1962. An entry was issued fixing December 31, 1960, as the date certain for valuation and the year ended June 30, 1961, as the accounting test period, and ordering applicant to submit amended accounting exhibits in compliance thereto. The entry was served on counsel for the company.

April 12, 1962. Certification was received from the East Ohio Gas Company of service of notice on Village of Orange of termination of ordinance.

May 1, 1962. Applicant filed Exhibit B-1, a complete operating statement for year ended June 30, 1961, and Exhibit C-1, anticipated income and expense for the year 1962, pursuant to Commission Order dated March 15, 1962.

May 4, 1962. Applicant filed proof of legal notice.

May 16, 1962. East Ohio Gas Company filed an application for approval of a random sampling plan for determining the location and number of inspections of the company's underground plant.

May 18, 1962. Entry issued setting the above application for approval of a random sampling plan for hearing on June 26, 1962, and reserving the dates of June 27, 28, and 29 for further hearing. The entry was served on all interested parties.

June 6, 1962. Applicant filed certification of service on the Village of Cortland of notice of termination of ordinance.

June 29, 1962. Entry issued scheduling further hearing regarding random sampling plan for July 10, 1962 and reserving July 11, 12, and 13, 1962. Entry was served on all interested parties.

July 3, 1962. East Ohio Gas Company submits certification of service on various municipalities of notice of termination of ordinances.

(3) July 3, 1962. Letter received from City of Struthers protesting rate increase.

August 14, 1962. Entry issued granting Company's Application for approval of random sampling plan. Served to all interested parties.

August 22, 1962. East Ohio Gas Company filed list of inspection locations provided by random sampling plan.

September 11, 1962. City of Massillon filed Petition for reopening, rehearing, and reconsideration of matter decided by "Entry with respect to Random Sampling Plan."

September 12, 1962. City of Canton filed Petition for reopening, rehearing, and reconsideration of matters decided by "Entry with respect to Random Sampling Plan."

September 13, 1962. Petition filed by City of Cleveland, Ohio, for reopening, rehearing, and reconsideration of matters decided by "Entry with respect to Random Sampling Plan."

October 3, 1962. Entry issued denying above applications for rehearing on random sampling plan.

October 4, 1962. Above entry was served on all interested parties.

October 29, 1962. Received letter dated October 26, 1962, from East Ohio Gas Company certifying service of notice on Village of Stone Creek of termination of Ordinance No. 91.

November 30, 1962. Cities of Canton, Cleveland, and Massillon filed notice of appeal to the Supreme Court from the orders of the Commission dated August 14, 1962 and October 3, 1962.

April 4, 1963. Filed mandate of Supreme Court, dated April 3, 1963, dismissing above appeal.

May 14, 1963. Staff report filed, and duly served according to law.

June 7, 1963. Objections to staff report and Petitions to Intervene filed by the City of University Heights, Ohio, and by the Village of Mayfield, Ohio.

June 10, 1963. Objections to staff report and Petitions to Intervene filed by the City of New Philadelphia, Ohio; by the City of Youngstown, Ohio; by the City of Wadsworth, Ohio; by the City of Brooklyn, Ohio; and by the Village of Munroe Falls, Ohio.

June 10, 1963. Objections to staff report filed by the City of Akron, Ohio, and by the City of Massillon, Ohio.

June 11, 1963. Objections to staff report and Petitions to Intervene filed by the City of Cuyahoga Falls, Ohio; by the City of East Cleveland, Ohio; and by the City of Solon, Ohio.

June 11, 1963. Objections to staff report filed by City of Canton, Ohio, and by the City of Cleveland, Ohio.

June 12, 1963. East Ohio Gas Company filed photostats of original report forms of company's inspectors as made in 1962-1963, inspections of mains and services pursuant to Commission's Entry of August 14, 1962, granting approval of random sampling plan.

(4) June 12, 1963. Objections to staff report filed by City of Garfield Heights, Ohio.

June 12, 1963. Objections to staff report and Petitions to Intervene filed by the Village of Canal Fulton, Ohio; by the City of Lyndhurst, Ohio; by the City of Maple Heights, Ohio; by the City of Dover, Ohio; by the City of Euclid, Ohio; and by the City of Warren, Ohio.

June 12, 1963. Objections to staff report filed by the East Ohio Gas Company.

June 13, 1963. Objections to staff report and Petition to Intervene filed by Lakewood, Ohio; by City of Wooster, Ohio; by City of Bedford Heights, Ohio; and by Village of Parkview, Ohio.

June 13, 1963. Objections to staff report filed by Municipality of Twinsburg, Ohio and by the City of North Canton, Ohio.

June 14, 1963. Objections to staff report and Petition to Intervene filed by City of Tallmadge, Ohio; by City of Louisville, Ohio; by the Village of Boston Heights, Ohio; and by the Village of Hartville, Ohio.

June 10, 1963. Notice by Chairman Johnson that hearings will proceed day by day continuously and that counsel should be prepared accordingly.

June 13, 1963. Entry issued assigning the application for public hearing on July 9, 1963, and reserving the dates of July 10, 11, 12, 16, 17, 18, 19, 23, 24, 25, and 26, 1963 for further hearing.

June 17, 1963. Above notice from Chairman Johnson and entry assigning hearing dates were served on counsel for the company, the Mayors and County Prosecuting Attorneys in the area affected by the application, and certain city solicitors.

June 19, 1963. Above notice and entry were served on all other interested parties.

June 17, 1963. Applicant filed valuation of property as of December 31, 1960 (from Volume II of Exhibit A to the Application) revised to reflect changes in inventory value of gas in storage and other minor adjustments included in the Commission's staff report filed May 14, 1963, and with written testimony of Arthur H. Forbes.

June 17, 1963. Applicant filed copies of Commission's Finding and Opinion and Finding and Order in prior Cases Nos. 11001, 11218, and 11442.

June 17, 1963. Applicant filed Copy of the Commission's staff report filed May 14, 1963.

June 17, 1963. Applicant filed map of East Ohio System as of December 31, 1962.

June 17, 1963. Applicant filed copy of Exhibit A to the Application, Volume 2-Appraisal (previously filed August 1, 1961).

June 17, 1963. Applicant filed Valuation of Property as of December 31, 1960 (from Volume 2 of Exhibit A to the Application-Revised) using Depreciation of Mains and Services as Determined by the Company Based on the 1962-1963 Pipe (5) Inspections and including Written Testimony of Arthur H. Forbes.

June 17, 1963. Applicant filed Valuation of Property as of June 30, 1962, including written testimony of Arthur H. Forbes.

June 17, 1963. Applicant filed Program for 1962-1963 Inspections of Mains and Services, including written testimony of Parry Keller.

June 17, 1963. Applicant filed written testimony of William Thompson Smith reference 1962-1963 Inspections of Mains and Services.

June 17, 1963. Applicant filed exhibit—"Analysis of Results Obtained from the 1962-1963 Inspection of Mains and Services Pursuant to Random Sampling Plan," and including written testimony of Dr. W. Edward Deming.

June 17, 1963. Applicant filed copy of Exhibit B-1 to application (previously filed on May 1, 1962).

June 17, 1963. Applicant filed copy of Exhibit C-1 to application (previously filed on May 1, 1962).

June 17, 1963. Applicant filed exhibit setting forth with the original cost of each parcel of land owned by company as of December 31, 1960, December 31, 1961, and December 31, 1962, exclusive of distribution land in Lake

and Ashtabula Counties, and including written testimony of Robert L. Koblenzer.

June 17, 1963. Applicant filed a comparison of natural gas rates charged by the East Ohio Gas Company with such rates charged elsewhere in the United States, and including written testimony of Robert L. Koblenzer.

June 17, 1963. Applicant filed exhibit—Investor's Appraisal of Capital Risk in Natural Gas and Electric Companies, including written testimony of Eugene S. Merrill.

June 17, 1963. Applicant filed exhibit—Utilities Having Adjustment Clauses in Rate Schedules, including written testimony of Robert L. Koblenzer.

June 18, 1963. Objections to staff report filed by City of Broadview Heights, Ohio, and by City of Struthers, Ohio.

June 20, 1963. Applicant filed complete operating statement for the year ending June 30, 1961, reflecting certain adjustments set forth in the Commission's staff report filed May 14, 1963, and also annual depreciation allowances as determined from the 1962-1963 pipe inspections, and including the written testimony of Francis H. Wright.

June 20, 1963. Applicant filed statement of income and expenses for the year 1962 using actual income and expense and including written testimony of Francis H. Wright.

June 20, 1963. Applicant filed exhibit showing comparative financial statements for The East Ohio Gas Company for the years 1943 through 1962 revised to give effect to refunds received from intergas suppliers through December 31, 1962, and including written testimony of Francis H. Wright.

June 24, 1963. Applicant filed statistical data as to the

properties and operations of The East Ohio Gas Company for the year 1962, and written testimony of John A. Hungerford.

(6) June 24, 1963. Applicant filed exhibit re "Cost of Capital and Rate of Return Study" including written testimony of Dr. John K. Langum.

June 24, 1963. Applicant filed exhibit entitled "Correlation of Accrued Depreciation and Annual Depreciation" and associated written testimony of Francis H. Wright.

June 25, 1963. Motion to alter proposed hearing procedures filed by City of North Canton, Ohio; by City of Canton, Ohio; by City of Fairview Park, Ohio; and by City of Cleveland, Ohio.

June 25, 1963. Objections to staff report and Petition to Intervene filed by Village of New Middletown.

June 26, 1963. Motion to dismiss the company application and/or staff report and motion to dismiss certain company exhibits submitted to P. U. C. O. on June 15, 19, and 21, 1963 was filed by City of Akron, Ohio.

June 26, 1963. Motion to alter proposed hearing procedures filed by City of Orrville, Ohio.

June 27, 1963. Motions to alter proposed hearing procedures filed by City of Maple Heights, Ohio; by City of Lyndhurst, Ohio; and by City of Louisville, Ohio.

June 27, 1963. Applicant filed "Memorandum of Law and Comments on the Protests and Objections of Certain Municipalities to the Staff Report of Investigation."

June 28, 1963. Applicant filed Comments on Akron's "Motion to Dismiss the Submission by the Company of the following items alleged to be within Rule 1.30 (8), submitted to P. U. C. O. on or about June 15, June 19, 1963, and June 21, 1963."

June 28, 1963. Applicant filed Brief opposing Cleveland's Motion to alter proposed hearing procedures.

June 28, 1963. Entry issued granting petition of various Municipalities to intervene in proceedings. Entry was served on interested parties.

July 1, 1963. Applicant filed Brief opposing Akron's "Motion for an Order to dismiss the Company's application and/or to reject the Staff Report of investigation and requesting a hearing thereon."

(7)

COMMISSION DISCUSSION.

This case involves 11,692 pages of testimony during 113 days of public hearings.

The Application was filed August 1, 1961 by The East Ohio Gas Company, hereinafter referred to as East Ohio or Applicant; the hearings were completed May 27, 1964.

On August 28, 1961, the cities of Akron, Cleveland, and Massillon filed a motion to dismiss the Application and in their motions and briefs alleged that the Application was filed prematurely. The company filed its brief in support of the Application.

The Commission issued its Finding and Order November 2, 1961, overruling the motion to dismiss. This Commission has reviewed the briefs filed in connection with the motion to dismiss and affirms the prior Commission's order.

Hearings were held regarding the random sampling on June 26, 27, and on July 10, 11, 12, 13, 17 and 18, 1962.

The Commission issued its Order August 14, 1962. This Commission has reviewed all of the testimony adduced at said hearing and hereby affirms the former commission's findings and order.

A remaining question as to jurisdiction and scope of this proceeding was raised by Counsel for the City of Akron. This was advanced at Transcript 9653 et seq. in the form of a request, and motion to strike certain exhibits and motion in the nature of a motion to dismiss on the basis that the scope of the Application is limited only to the 108 municipalities and does not include the adjacent rural areas.

The Application as filed by the Company states as follows at page 1:

> "For its application to the Commission herein pursuant to Ohio Revised Code Section 4909.17 and related sections East Ohio states:
>
> 1. East Ohio presently serves natural gas to 108 municipalities in counties other than Ashtabula and Lake, each of such municipalities being organized and existing under the constitution and the laws of Ohio. These are listed on page 1 of Exhibit 1 hereinafter referred to. *East Ohio also serves consumers in rural areas adjacent to such municipalities, the rates to whom are by arrangements approved by the Commission adjusted to the rates of the municipalities to which such rural areas are adjacent.*" (Emphasis supplied.)

The prayer of said Application (p. 6) reads as follows:

> "WHEREFORE, East Ohio respectfully prays that the Commission in accordance with said Section 4909.17 and related sections at once cause to be made *an investigation of the facts set forth herein and in said exhibits filed herewith and of the matters and things connected therewith;* upon expeditious and final hearing issue its order authorizing East Ohio to file with the Commission and put into effect said proposed schedules P. U. C. O. No. 100 and Supplement Nos. 1 and 2 thereto on February 1, 1962 (July 1, 1962 as to Orange; August 16, 1962 as to Cortland; October 1,

1962 as to Bentleyville, Chagrin Falls, Glenwillow, Parral (8) and Stone Creek), or so to file and put into effect schedules yielding a revenue not less than would be yielded by said proposed schedules; *and make such further orders and grant such further relief herein as may be necessary, just and proper in the premises.*" (Emphasis supplied.)

The Commission in the order of November 2, 1961, previously noted, had occasion to observe as to the scope of the application, at least by way of *dicta* as follows:

"The Application is applicable to consumers in some 108 municipalities within the Company's service area (excepting those municipalities within Ashtabula and Lake Counties) *and to those consumers situated in rural areas adjacent to municipalities.* The rates for service to such rurally located consumers have been established by arrangements approved by this Commission which authorize rates at the level of the rates fixed by the municipalities to which such rural areas are adjacent. *East Ohio's rates are generally uniform throughout its service area* except for that portion situated in Ashtabula and Lake Counties. For a number of years, the rate levels approved legislatively by the various municipalities have been pegged to those established by the Council of the City of Cleveland." (Emphasis supplied.)

In the dissent of Commissioner McGovern (p. 1) appears the following:

"The application states that the 'existing rates,' i.e., the ordinance rates accepted by the company, *and the arrangements made the company with customers in unincorporated areas* 'are * * * unreasonable and confiscatory' and refers to the 'unreasonableness, unfairness and confiscatory effect of the present rates * * * to consumers, both presently and after February 1, 1962.' (Application page 5.)" (Emphasis supplied.)

It should be observed that the exhibits filed with said application include both the municipalities and adjacent rural areas except Lake and Ashtabula Counties. (EOX13.) The pipe inspections and evidence thereon under the randsom sampling plan authorized by the Commission related to all property in the service area of the company except Ashtabula and Lake Counties. "Arrangements" under which the customers in rural areas adjacent to municipalities are authorized by Section 4905.31, Revised Code. Attention of the Commission at the hearing was referred to the Commission proceedings in which such arrangements are approved and the contracts or list of consumers are filed with the Commission for judicial notice thereof. The following appears at Transcript 9629-9630:

> "Commissioner Johnston: The Commission, I would think, would take judicial notice of that, Mr. White. You shouldn't have to establish that * * *. Well our records will show whether there are or not. The Commission files will show."

(9) Those cases, together with filings thereon, are urged by the Company as follows: (Reply Brief of East Ohio Gas Company, note p. 12):

> ** These orders covering East Ohio's service to all consumers located outside of incorporated municipalities (except in Ashtabula and Lake Counties) as presently in effect were issued in the following Cause Nos. 11,618, 11,619, 11,858, 11,912, 11,913, 11,921, 11,987, 12,063, 12,111, 12,112, 12,175, 12,192, 12,213, 12,272, 12,292, 12,293, 12,309, 12,331, 12,481, 12,522, 12,523, 12,524, 12,525, 12,554, 12,555, 12,626, 12,707, 12,742, 12,902, 12,936, 12,975, 13,208, 13,250, 21,546, 21,547, 22,158, 22,923, 22,924, 22,925, 22,926, 22,927, 22,928, 22,954, 22,955, 23,879, 23,880, 23,881, 25,132, 25,205, 25,436, 25,437, 25,599, 25,684, 25,685, 25,686, 26,452, 26,506, 26,507, 26,508, 26,509, 26,574, 26,575, 26,661, 26,662, 26,767, 26,768, 26,791, 26,792,

26,838, 26,839, 26,869, 26,907, 27,018, 27,019, 27,020, 27,071, 27,072, 27,073, 27,074, 27,118, 27,119, 27,153, 27,154, 27,155, 27,156, 27,212, 27,287, 27,288, 27,289, 27,290, 27,772, 27,773, 27,774, 27,836, 27,946, 27,947, 27,948, 27,995, 27,996, 27,997, 28,044, 28,140, 28,141, 28,142, 28,143, 28,441, 28,721, 28,722, 27,723, 28,724, 28,725, 28,726, 28,727, 28,728, 28,729, 28,730, 28,731, 28,780, 28,781, 28,782, 28,783, 28,909, 28,910, 28,911, 28,953, 29,017, 29,018, 29,194, 29,195, 29,196, 29,277, 29,278, 29,414, 29,516, 29,580, 29,736, 29,737, 29,795, 29,796, 29,853, 29,855, 29,977, 29,978, 30,145, 30,253, 30,254, 30,523, 30,524, 30,654, 30,655, 30,777, 31,132, 31,417, 31,674, 31,675, 31,676, 31,677, 31,846, 31,986 and 32,020, 12,278.

Judicial notice thereof is accordingly taken by the Commission. Based thereon, together with the Application and supporting exhibits, testimony thereon and the dicta contained in the previous orders herein by prior Commissions, the scope of this proceeding includes the various municipalities and adjacent rural areas within the Company's service area (except Lake and Ashtabula Counties). The various motions to dismiss on this basis are, accordingly, not well made and are overruled. Similarly, insistence by the City of Akron as to allocation on the basis of municipalities is not well made. Allocation only on the basis of exclusion of Lake and Ashtabula Counties is hereby adopted for the purpose of this proceeding.

This proceeding came on for hearing for direct testimony July 9, 1963 and hearings were held July 9, 10 and 11, 1963.

Cross examination started August 6, 1963 and consumed 102 days; hearings were completed May 27, 1964.

VALUATION.

The Company submitted a valuation by trending surviving dollars, most of the trending indices were built up from the experience of the Company, published trending

factors were used on structures. Rights of Way were based upon the Company's recent experience. The Company made piece meal adjustments in some of the accounts.

The Commission's engineering staff used published trend factors to determine Reproduction Cost New Valuation.

(10) All of the cities objected to the trending method, although the cities of Canton, Cleveland, and Massillon priced out four pipeline accounts and used the book value for all Rights of Way; for the remainder of the accounts, the cities used the Company's trended valuation. A summary of said valuations is as follows:

	Commission Ex. 4			
		Depreciation		
Classification	R.C.N.	%	Amount	R.C.N.D.
City Gate System:				
Production	$ 16,963,777	43.7%	$ 7,416,135	$ 9,547,642
Underground Storage	50,247,049	26.8	13,498,491	36,748,558
Transmission	117,591,686	16.5	19,349,555	98,242,131
Distribution	908,917	12.2	110,715	798,202
General	1,089,651	25.6	278,348	811,303
Total City Gate System	$186,801,080	21.8%	$ 40,653,244	$146,147,836
Distribution System:				
Distribution	$302,615,288	18.9%	$ 57,320,055	$245,295,233
General	6,615,529	27.6	1,826,781	4,788,748
Total Distribution System	$309,230,817	19.1%	$ 59,146,836	$250,083,981
Total Plant	$496,031,897	20.0%	$ 99,800,080	$396,231,817

	Company Exhibit 15			
		Depreciation		
Classification	R.C.N.	%	Amount	R.C.N.D.
City Gate System:				
Production	$ 16,437,341	39.97%	$ 6,422,858	$ 10,014,483
Underground Storage	47,732,342	24.10	11,503,038	36,229,304
Transmission	118,501,245	13.80	16,355,149	102,146,096
Distribution	925,568	10.84	100,352	825,216
General	1,055,162	27.59	291,067	764,095
Total City Gate System	$184,651,658	18.78%	$ 34,672,464	$149,979,194
Distribution System:				
Distribution	$307,040,176	16.98%	$ 52,142,782	$254,897,394
General	6,400,029	30.96	1,981,267	4,418,762
Total Distribution System	$313,440,205	17.27%	$ 54,124,049	$259,316,156
Total Plant	$498,091,863	17.82%	$ 88,796,513	$409,295,350

Classification	Cities Exhibit E E			
	R.C.N.	Depreciation %	Depreciation Amount	R.C.N.D.
City Gate System:				
Production	$ 16,824,255	55.15%	$ 9,278,748	$ 7,545,507
Underground Storage	47,726,194	29.55	14,103,033	33,623,161
Transmission	94,173,356	32.18	30,301,247	63,872,109
Distribution	925,568	10.84	100,352	825,216
General	1,055,162	27.59	291,067	764,095
Total City Gate System	$160,704,535	33.65%	$ 54,074,447	$106,630,088
Distribution System:				
Distribution	$254,866,040	33.19%	$ 84,594,809	$170,271,231
General	6,400,029	30.96	1,981,267	4,418,762
Total Distribution System	261,266,069	33.14%	$ 86,576,076	$174,689,993
Total Plant	$421,970,604	33.33%	$140,650,523	$281,320,081

Counsel for the City of Akron stated in his brief, in part, as follows:

> "(A) Since the RCN valuation evidence submitted by the Company was based almost entirely upon a trending of bulk dollars of alleged surviving assets (of very questionable validity) contrary to the mandatory inventory price-out requirements of Section 4909.05 R. C., and since the results of such trending were shown through the cross-examination of Company Witness Forbes to produce inconsistent and sometimes ludicrous prices (Tr. 2256-2670 inclusive) the Company's RCN valuation evidence has no probative value and must be rejected by the Commission for rate making purposes."

The same Counsel made the following allegations in *Dayton vs. P. U. C. O.*, 174 Ohio St. 160:

> "The Commission erred in submitting into evidence the reproduction cost new estimate of the Company's property as prepared and sponsored by Company Witness Tackett, *which estimate was based upon a trending of bulk dollars of alleged surviving assets unrelated to a unit inventory or any inventory of the Company's physical property and in violation of the*

valuation formula provided and required by the Legislature in Section 4909.05 O. R. C."

"The Commission erred in its Order of July 22, 1960 in that its determination and finding of the reproduction cost new value of the Company's physical property allocable to gas service in the City of Dayton was not based upon the pricing of a lawful inventory, as required by Section 4909.05 O. R. C. and the rules of the Commission, but was predicated upon a trending upward of bulk dollars of alleged surviving assets in all major accounts by (12) application thereto of published trend factors, the composition and formulation of which trend factors are unknown and unknowable, and which have no application to the specific physical property of The Dayton Power and Light Company.

"*In predicating its reproduction cost new valuation findings upon a trending or unidentified bulk dollars or alleged surviving assets by application to said bulk dollars of trend factors,* the composition and formulation of which are unknown and unknowable, and which trend factors have no relation to the specific physical property of The Dayton Power and Light Company, the Commission has denied the City of Dayton the rudiments of a fair trial, and has deprived the City of Dayton of its right to due process of law as guaranteed by the Ohio Constitution and the Fourteenth Amendment to the Constitution of the United States in that said reproduction cost new valuation findings of the Commission are not susceptible of check, verification, challenge, or review."

The Supreme Court affirmed the Commission's valuation determination, stating (174 Ohio St. 161-62, 187 N. E. 2d at 151):

"A study of the record and briefs discloses 39 assignments of error, 7000 pages of evidence taken during 57 days of hearing, 384 pages of briefs and 40

pages of majority, concurring and dissenting opinions by members of the Public Utilities Commission."

"One result of the study of this mass of material is that the court finds no respect in which the order of the Commission is unlawful. The principles of law involved have been discussed and applied by this Court in numerous cases."

Upon rehearing the Supreme Court reversed in part its initial decision on different grounds but reaffirmed the Commission's valuation based largely on trending, stating (174 Ohio St. at 606, 190 N. E. 2d at 915):

"The other findings and determinations of the Commission alleged to be in error in these appeals are not unreasonable or unlawful. The former judgment of this Court is set aside and the order of the Public Utilities is reversed in part, and the cause remanded for determination of rates."

It is evident that the Court has previously rejected the same objections on this subject.

As to the claim herein regarding cross-examination of Company Witness Forbes in producing inconsistent and sometimes ludicrous prices (Tr. 2256-2670), several pages of testimony were adduced in comparing prices per foot of pipe by the trending method vs. the priced-out method which the company had made to test the results of its trending of some of its pipe lines.

However, no evidence was adduced at the hearing to indicate that the company's books of record were not kept pursuant to the classification of accounts, nor any evidence to indicate that the records were not correct.

(13) This is further evidenced by the testimony of City Witness Honaker (R. 10687) in which he testified as follows:

"The totals for the material component as trended by East Ohio Gas Company of $84,909,399 when com-

pared with the total for the material component as priced-out in its working papers by East Ohio Gas of $84,708,856 are sufficiently close, from a statistical viewpoint."

Actually the difference is less than ¼ of 1%.

Another City Witness Rowe testified (R. 10393-10394) as follows:

"Dr. Berrettoni requested that we obtain, for the purpose of his study, the balance of the plant in service in these pipeline accounts at January 1, for the years 1959 through 1962 by vintage year of installation and the retirements of plant in each of these years, also segregated by vintage year of installation, for the areas involved in this proceeding. This data was obtained directly from the unitized property records of the company. For each of these pipeline accounts we obtained from the individual unit property ledger cards the balances at the beginning and end of each year and the changes or activity occurring during the year. In support of the summary entries on the property ledger cards, the company maintains detailed IBM tabulations, the gross transactions were segregated into additions, retirements, transfers and corrections, and each of these classes of transaction was further broken down by vintage year. Next, every item of each transaction class was reviewed to summarize and extract all activity relating to Lake and Ashtabula Counties. The final step was to remove the amounts indicated by the company as being related to the Pratt Adjustment. This last step was accomplished by use of analyses prepared by the company in the regular course of maintaining the unitized property records.

The data thus assembled was tied out and reconciled to the unitized property record, the general books of the company, and to E. O. E. No. 13. This assured the accuracy of the basic summarization by vintage year."

The following is a comparison of Estimated Reproduction Costs as of December 31, 1960 of the Four Pipeline Accounts as shown in Commission, Company, and the Cities' Exhibits. (The Cities' Exhibit EE is designated Canton, Cleveland, and Massillon (CCMX EE).)

(14)

Acct. No.	Classification	Commission Staff (PUCOX 2A & 4)	East Ohio (EOX 13 & 15)	3 Cities (CCMX EE Revised (A))
333.1	Field Lines			
	Material	$ —	$ 4,072,828	$ 4,072,828
	Labor	—	2,955,194	3,371,901 (B)
	Total Acct. 333.1	$ 7,356,425	$ 7,028,022	$ 7,444,729
343.3	Storage Lines			
	Material	$ —	$ 4,422,909	$ 4,422,909
	Labor	—	1,945,242	2,167,746 (B)
	Total Acct. 343.3	$ 6,702,300	$ 6,368,151	$ 6,590,655
353	Transmission Lines			
	Material	$ —	$ 54,722,497	$ 51,031,467 (D)
	Labor	—	44,581,001	27,691,448 (C)
	Total Acct. 353	$ 97,736,573	$ 99,303,498	$ 78,722,915
359	Distribution Lines			
	Material	$ —	$ 88,362,222	$ 81,398,465 (D)
	Labor	—	132,780,385	89,370,433 (B)
	Paving	—	5,734,993	5,734,993
	Total Acct. 359	$218,381,170	$226,877,600	$176,503,891
	Total Four Pipe Lines			
	Material	$ —	$151,580,456	$140,925,669
	Labor	—	182,261,822	122,601,528
	Paving	—	5,734,993	5,734,993
	Total	$330,176,468	$339,577,271	$269,262,190

Notes: (A) Revised to include material costs added by witness Stanley at Tr. 11418-20; (B) from CCMX D; (C) from CCMX E; (D) from CCMX CC revised by witness Stanley at R. 11418-20.

The differences in the valuations are as follows:

	Commission Ex. 4	Company Ex. 15	Difference	%
RCN	$496,031,897	$498,091,863	$2,059,966	4.15%
Existing Depreciation	99,800,080	88,796,513	(11,003,567)	(11.03)
RCND	$396,231,817	$409,295,350	$13,063,533	3.30

	Commission Ex. 4	Cities Ex. EE	Difference	%
RCN	$496,031,897	$421,970,604	($74,061,293)	(14.93%)
Existing Depreciation	99,800,080	140,650,523	40,850,443	40.93
RCND	$396,231,817	$281,320,081	($114,911,736)	(29.00)

(15) The three cities Canton, Cleveland, and Massillon employed different engineers to make an estimated reproduction of four of the pipe line accounts.

City Witness C. Maxwell Stanley, a senior partner and general manager of Stanley Engineering Company, testified his firm offers a broad practice including power generation and transmission and distribution, water supply treatment, gas distribution, streets, highways and airport, industrial buildings and plants, systems management, rates and valuations, and area planning.

However, City Witness Stanley testified his firm designed and supervised construction of one gas distribution system (R. 11,525). The amount involved in this project was $300,000 (R. 11,528). His firm did not supervise purchase of pipe for this project.

The largest difference in the price of pipe that City Witness Stanley used was a 5% discount for pipe which the witness said was his judgment. City Witness Stanley testified (R. 11,533-34) in answer to the following question:

> Q. Well, did you or your firm purchase or supervise the purchase of any substantial quantities of pipe in 1960?
>
> A. No, not of this quantity of pipe. The same answer for 1961, 1962, 1963, 1964.

The annual reports of applicant indicate that East Ohio has expended the following amounts for gross additions to its plant and property for the years 1946 through 1960:

1946	$ 12,479,619
1947	10,801,140
1948	15,292,694
1949	8,942,703
1950	12,007,140
1951	16,846,127
1952	8,936,827
1953	12,187,645
1954	9,676,448
1955	27,836,999
1956	17,191,585
1957	39,865,079
1958	20,770,927
1959	24,828,100
1960	23,899,646
	$261,562,679

(16) It is reasonable to believe that with this amount of capital expenditures East Ohio would have purchased many tons of pipe each year. There is nothing in the evidence to indicate that East Ohio did not obtain the best price available.

City Witness Arnold priced the labor and performance. It is clear from the testimony (R. 11,345) of City Witness Arnold that he did not make a reproduction cost new estimate; it was a replacement cost; nor did he include administrative and legal expenses, nor interest or taxes during the construction period estimated to be two years.

City Witness Arnold (R. 11,346) stated:

"We are presuming that we are replacing this pipe in the same trench that it is currently in."

He further testified (R. 11,348):

"It is reconstruction. It is not new construction of a new system, it is a reconstruction of an existing system. * * *. I would call it my own—I would prob-

ably—it is generally that this is the description of the type of estimate that the city instructed us to make."

City Witness Arnold admitted that his hypothetical gang cost was $328.49 (R. 11,362) and his estimate that such gang or crew could excavate 76.6 cubic yards per day which would be a cost of $4.29 per cubic yard. City Witness used $1.75 for a cubic yard and he did not satisfactorily justify the $1.75 per cubic yard that he used.

It is apparent that City Witness Arnold was not familiar with the statutes. Section 4909.05 Revised Code reads in part as follows:

"The cost of *new production*, as of a date certain, of all physical property, other than land, owned and used by such utility * * *." (Emphasis added.)

City Witness Rowe testified (R. 11,085):

"Upon advice of counsel, the gross valuations for all Rights of Way Accounts have been included at book costs."

The Commission finds no evidence in the record to support this contention.

In view of the fact that City Witness Arnold testified that his pricing was solely replacement costs and not reproduction costs and the rights of way being included at book costs and the 5% discount based solely on judgment and not supported by tangible evidence precludes this Commission from giving any consideration to the so called reproduction cost new (17) valuation submitted by Canton, Cleveland and Massillon Exhibit E E.

As previously stated, the staff engineers used published trend factors applied to surviving dollars to determine the reproduction cost new valuation.

The present Chief Engineer Mr. Patton testified (R. 9028-29) as follows:

"The derivation and the selection of the index numbers were checked and the conversions of those into composite trends were all recalculated to verify the accuracy of the take-offs and the computations. It was felt that this was an important part of checking the report. There were minor errors found in the calculation of these results and tests were made by applying the recalculated trends to several of the accounts. The over-all errors due to these minor errors, and they were very small, proved to be so negligible that it felt that the final totals as arrived at could be accepted as such."

The company built its trend factors from its own experience and made piece-meal adjustments. The reproduction cost new valuation determined by the staff is 4.15% lower than the reproduction cost new submitted by the applicant.

Accordingly, the Commission is of the opinion that the reproduction cost new value in the amount of $496,031,897 is reasonably correct, subject to the following adjustment:

The company acquired the Mohican property in 1912 and recorded said acquisition on its books of record, $330,390.77 more than shown on predecessor's books (R. 8,208). There remained in the transmission lines as of December 31, 1960 the amount of $18,216.72 (R. 8,208) and there remained in its property accounts $38,818.08 in the distribution lines (R. 8,210). These remaining dollars had been trended. Therefore, an adjustment should be made to eliminate the trended amounts from the RCN values.

Transmission	$18,212.72	5.332%	$ 97,132
Distribution	38,818.08	9.206%	357,359
Amount of Adjustment			$454,491
Reproduction Cost New Commission Ex. 4			$496,031,897
Adjustment (Mohican acquisition)			454,491
Adjusted Reproduction Cost New			$495,577,406

Giving effect to this adjustment, for the purpose of this proceeding, the Reproduction Cost New value as of December 31, 1960 is $495,577,406.

EXISTING DEPRECIATION.

(18) City Witness Stanley testified R. 10877 as follows:

> "* * * The age life, office or actuarial method reflects accrued depreciation arising from all causes of retirement of property, including existing mechanical deterioration. Therefore accrued depreciation determined by the age life method is total accrued depreciations * * *."

City Witness Stanley further testified on this subject R. 11458 as follows:

> "* * * I am of the opinion that the actual experience record of the company is the soundest indication of the rate of loss of service life, and hence, is the proper basis to use in determining per cent condition or, its reciprocal the accrued depreciation * * *."

The Court spoke on this subject in *Lima Tel & Tel Co. vs. Public Utilities Commission of Ohio,* 98 Ohio St. 110, in which they stated:

> "A depreciation account carried on the books of a utility pursuant to a plan laid down in advance, and in

obedience to our statute, while a wise and proper procedure in order to provide a fund for replacements, may or may not show the actual depreciation which the property has undergone. *Actual depreciation is not uniform; it varies in different years with the vicissitudes of actual experience. What it has been at a particular time can only be determined by actual observation and study at that time.* The Commission was justified in giving effect to the testimony of the witness touching this subject."

The Court stated in *Cincinnati vs. Public Utilities Commission,* 113 Ohio St. 259-260:

"In fixing the valuation of such physical property, *actual depreciation at the time* of inquiry should be considered. Where the books of the utility carry a *'reserve depreciation account'* largely in excess of the actual depreciation found and deducted by the commission, *such excess should not also be deducted from the present reproductive cost.* The utility is entitled to a reasonable return on the fair value of its property actually used and useful for the convenience of the public. While the history of a utility is an element to be considered in fixing a rate, this does not justify a deduction of more than actual depreciation from the net value of such physical property in order to ascertain its present fair valuation; nor does the fact that past profits secured from consumers in former years were invested in plant additions justify the deduction of the entire 'reserve depreciation account' carried on the utilities books from the fair value of the utility's plant, including such as may have been added thereto by new construction, extensions, or betterments."

The Court stated in *Ohio Edison Company vs. The Public Utilities Commission,* 173 Ohio St. 478 in part as follows:

"* * * However, the words 'actual' or 'observed' in those opinions and syllabi were used to differenti-

ate rate base depreciation from a reserve for depreciations (i.e. book depreciation). The latter is the sum of past depreciation allowances as *operating expenses* and of course has no relevance, in determining reconstructive cost new less depreciation." (Emphasis the Court's.)

City Witness Deutsch claimed obsolescence existed in the transmission pipe lines, and based upon applicant's reproduction cost new valuation the element of obsolescence claimed would amount to $25,028,362, and in the Cities reproduction cost new would amount to $12,355,259. His computations in this respect were based on a redesign of existing plant.

There is nothing in the evidence to indicate that the company had not used modern methods in its original construction program. Furthermore, it is the company's property used and useful that must be considered. Obsolescence has been defined as changes in the art, shifting of business centers, loss of trade, inadequacy, supercession, prohibitory laws, and other things which apart from physical deterioration, operate (19) to cause plant elements, or the plant as a whole, to suffer diminution in value.

There was no evidence adduced in the record to indicate that new pipe having the same diameter would transport more gas than an older pipe with the same diameter. Obsolescence in the existing pipeline facilities of the applicant was, therefore, not affirmatively demonstrated.

The book costs as of December 30, 1960 excluding gas stored is $296,015,057

Less: Accounting adjustments	334,333		
Pratt adjustments	6,747,208		
Ashtabula & Lake counties	15,409,675	22,491,216	7.60%
Book costs applicable to property involved in this proceeding		273,523,841	92.4%
The depreciation reserve including amortization and depletion—total company (East Ohio Exhibit 21)		$70,800,665	
Percent applicable to plant involved		92.40	
Amount applicable to property involved or percentagewise—	23.92%	65,419,814	

The decision of the court in *Lima Telephone and Telegraph Company vs. The Public Utilities Commission, supra,* at page 119 of the opinion reads as follows:

> "A depreciation account carried on the books of a utility pursuant to a plan laid down in advance, and in obedience to our statute, while a wise and proper procedure in order to provide a fund for replacements, may or may not show the actual depreciation which the property has undergone."

That decision clearly indicates that the purpose of accounting for depreciation, i.e. Depreciation Reserve is to recoup its original cost. Therefore, when an appraisal is made, it can be used to test the reasonableness of the accounting for depreciation, i.e. depreciation reserve. Such is not to say that it can be substituted therefor. Use of 33.33% existing depreciation as advanced by the cities would result in an understatement of $25,745,682 in the depreciation reserve for purposes of comparison.

Considering the fact that this company has expended for gross additions an amount of $261,562,679 for the period from January 1, 1946 to December 31, 1960 (hereinbefore listed by years) would require a depreciation reserve of $91,165,496, which is not only unrealistic, but

contrary to our statutes, the uniform decisions of the Supreme Court and not in the best interest of the public.

This is tantamount to some of the arguments in the *City of Cleveland et al., Appellants v. Public Utilities Commission*, 164 Ohio St. 442, the Court stated at 444:

> "Many of appellants' arguments represent attempts to circumvent the statutes of this state and the uniform decisions of this court with respect to the statutory rate base."

Applicant determined existing depreciation to be $88,796,513. or 17.82%. (East Ohio Exhibit 15.)

Testing this in the same manner indicates that the applicant might have accrued more for depreciation than would be necessary to recoup its original costs, as follows:

Book Costs $273,523,841 x 17.82%	=$48,741,948
Depreciation Reserve applicable to property involved	$65,419,814
Excess accrued over existing depreciation	$16,677,866

The existing depreciation determined by the Commission's staff was $99,800,080 or 20.%

Considering the fact that applicant has expended $261,562,679. for gross additions for the period from January 1, 1946 to December 31, 1960, it would appear that applicant's accounting for depreciation has been sound and that applicant would have approximately $10,700,000. to meet the demands from Public Authority (20) contingencies, extraordinary repairs, all elements of functional depreciation, which have been the experience of the past, and which were not present at the date certain, but may occur in the future.

The Commission is of the opinion that the existing depreciation determined by the Commission's staff is proper for the purpose of this proceeding.

However, the existing depreciation determined by the Commission's staff should be adjusted for the Mohican acquisition as disclosed by the record (R. 8208-8210).

COMMISSION'S EXHIBIT 4.

	R. C. N.	*Existing Depreciation*	*R. C. N. D.*
	$496,031,897	$ 99,800,080	$396,231,817
Adjustment	454,491	71,716	382,775
	$495,577,406	$ 99,728,364	$395,849,042

The Commission finds the reproduction cost new less existing depreciation to be $395,849,042.

WORKING CAPITAL.

The Commission's Staff determined the gross working capital and material and supplies to be $19,978,668, but deducted tax accruals on a pro forma basis.

Consideration must be given to the fact that the state excise tax is now paid on a quarterly basis rather than in December of each year. Furthermore, the Federal Income Tax payments have been accelerated. The Commission believes the proper deduction for tax accruals is 25% and must be applicable to the present tax accruals. Accordingly, the net working capital and material and supplies is computed as follows:

Gross Working Capital & Material and Supplies	$19,978,668
Less: Tax Accruals	4,109,550
Net Working Capital & Material and Supplies	$15,869,118

A summary of the findings for the rate base is as follows:

Reproduction Cost New	$495,577,406
Existing Depreciation	99,728,364
Reproduction Cost New Less Depreciation	$395,849,042
Plus: Working Capital Material & Supplies	15,899,118
Rate Base	$411,718,160

REVENUES.

The Company's revenues collected under the present rates for the area involved are $141,321,234 after excluding the revenues from industrial sales.

CITY GATE COST OF GAS.

The city gate cost of gas, as presented in this proceeding, means the total cost of gas purchased from others or produced by the company, including exploration and development costs and all expenses incident to the purchasing, production, storage and the transmission of gas to the city gates of the various distribution plants served by the company. It also includes a proportional share of administration and general expense and of all taxes payable by the company except federal income tax. The total of these costs are then reduced by the amount of gross revenues applicable to the industrial consumers less the amount of Ohio excise tax and Public Utilities Commission of Ohio maintenance applicable to the revenues so used.

(21) At R. 6894, inquiry of Company Witness Wright by Counsel for City of Akron reads as follows:

"Q. What is the effect of your credit then with respect to industrial sales?

A. Each town gets its proportionate share of the industrial credit of the profit on the industrial gas

and the proportion of residential and commercial gas to the total residential and commercial gas."

The Witness for the cities of Canton, Cleveland and Massillon used this method.

The Commission is of the opinion that this method is equitable to all consumers.

The rates proposed by applicant in this proceeding for residential and commercial consumers would provide additional gross revenue in the amount of $33,433,576.

The industrial consumers pay the same rates as the residential and commercial consumers for the initial volume or block and a different rate on the larger volume or larger block. This amounts to additional gross revenue from the industrial sales of $982,082 less excise tax of $26,614 making a net amount of $955,468. (Commission Exhibit 2B, Schedule 2.) This amount must be deducted to arrive at the proper City Gate Cost of Gas.

1. Expenses.

The cost of gas was reduced $3,074,901 using the latest cost of gas furnished by the Company as of June 1964, together with further reduction of $17,890, giving effect to rate reductions in cost of gas authorized by the Federal Power Commission, effective October 1, 1964.

Other adjustments shown in Commission Exhibit 2B were accepted by the company and were not disputed by the cities during cross-examination with the exception of contributions. This item, allocated to the area involved, amounts to $174,000, in which amount an allowance is hereby made.

2. Rate Case Expense.

Based upon the history of this company the commission is of the opinion that the rate case expense should be

amortized over a seven year period in lieu of five years used by the staff, or two years used by the applicant. Therefore $174,143 should be used in lieu of $243,800.

DEPRECIATION ACCRUALS.

The Company applied the accrual rates for depreciation to their reproduction cost new values to determine depreciation expense.

It is recognized that depreciation accruals are an expense. However, the company's cost over the years should be recouped and not values. Therefore, the Company's computation of depreciation expense is rejected.

Commission Witness Patton testified (R. 9029):

> "The depreciation accural rates were checked against the estimate life and recalculated and the results verified and were also checked against the 1961 Federal Power Commission average accruals taken from the depreciation practices of natural gas companies."

Commission Witness Patton was not questioned regarding depreciation expense. Therefore, the Commission finds the depreciation expense of $6,319,939 to be proper, $2,669,420 applicable to City Gate Cost and $3,650,519 to be applicable to distribution system involved in this proceeding.

The company normalized accelerated depreciation expense which is contrary to the Court's decision in *Cincinnati Gas & Electric Company vs. The Public Utilities Commission,* 173 Ohio St. 473.

This adjustment reduces the income tax liability in the amount of $1,119,904.

(22) FEDERAL INCOME TAX.

At the date certain in this proceeding the tax rate was 30% for normal and 22% for surtax.

The law was changed resulting in 1964 Tax rate being 22% normal and 28% surtax.

The tax rate for 1965 as enacted into law is 22% normal tax and 26% surtax.

Having in mind the Court's instructions in *City of Akron vs. The Public Utilities Commission,* 133 Ohio St. 212, as to the fixing of rates for the future, the 1965 tax rates are used for the purpose of this proceeding.

The Cities used guide line depreciation to compute the income tax liability. The provisions of the 'Federal Act' are not mandatory. Through the overall reduction in the Internal Revenue Service's official useful life figures for depreciable property (which the new guidelines accomplish), taxpayers may reduce the federal income tax—at least in the initial stages of depreciation. Moreover, the adoption in the guidelines of more simple standards and objective rules permit businesses to more easily adopt rapid equipment replacement practices in keeping with present and future economic conditions.

The record in this case demonstrated the longer life of gas property; accordingly rapid replacements of much of the gas property would not prove to be economical, as in other types of industry.

In the present case, management did not elect to use guideline depreciation.

The Supreme Court of Ohio, in the case of *Elyria Telephone Co. v. Public Utilities Commission of Ohio,* 158 Ohio St., 441, at page 448, stated as follows:

> "The Public Utilities Commission is a creature of statute and has only those powers given it by statute. *City of Cincinnati v. Public Utilities Commission,* 96

Ohio St., 270, 117 N. E., 381. Its powers do not include the right to manage utilities or dictate their policies. *West Ohio Gas Co. v. Public Utilities Commission*, 128 Ohio St., 301, 191 N. E., 105, reversed on other grounds, 294 U. S. 63, 79 L. Ed., 761, 55 S. Ct., 316."

The Commission is of the opinion that it cannot substitute its judgment for that of management, and reject the use of guideline depreciation in computing income tax liability for this proceeding.

The cities used flow through for investment tax credit. The investment tax credit was not enacted into law at the date certain. However, the Commission did take this item into consideration in determining the rate of return.

The revenues and expenses under the present rates using the 1965 tax rates may be stated as follows:

Revenues	$141,321,231
Operating Expenses	$104,177,075
Depreciation	3,650,519
Taxes Other Than Income	6,982,361
Income Taxes	9,914,465
Total Expenses	$124,724,420
Return	$ 16,596,811
Rate Base $411,718,160	
Rate of Return	4.03%

This represents a rate of return of 4.03% on the above determined rate base of $411,718,160. This Commission is of the opinion that such a rate of return is insufficient to provide applicant with reasonable compensation for the service rendered giving due regard to the value of applicant's property within the State of Ohio.

(23) RATE OF RETURN.

City Witness Wasick determined the rate of return to be as follows:

Equity	58.5 x 5.64	3.29
Debt	41.5 x 4.53	1.88
	Rate of Return	5.17%
	Rounded To	5.2 %

City Witness Honaker determined rate of return to be as follows:

48.70	Debt	4.45	2.17
9.00	Preferred	5.25	.47
42.30	Equity	6.50	2.75
		Rate of Return	5.39%

Company Witness Langum determined rate of return as follows:

Debt	41.5 x 4.6	1.909
Equity	58.5 x 7.75	4.533
	Rate of Return	6.442%
	Rounded To	6.50 %

Company Witness Murphy determined the rate of return to be as follows:

Debt	50% x 4.5	2.25
Equity	50% x 11.5	5.75
	Rate of Return	8.00%

Both City Witnesses determined the cost of equity based upon earnings price ratio.

The Commission is of the opinion and agrees with the NARUC Committee on Corporate Finance that the cost of equity today cannot be determined upon any mathe-

matical or statistical formula. It must be based upon enlightened judgment and such judgment must be tested.

After giving effect to the reduction in the cost of gas the latest of which was October 1, 1964, and having in mind the increased cost of wages, and taxes other than income, which more than offset the investment credit, and giving effect to the 1965 tax rates, i.e. 48%, the Commission is of the opinion that a rate of return of 6.25% is fair and reasonable.

This will result in the cost of money as follows:

Debt	41.5% x 4.60%	1.91
Equity	58.5% x 7.41%	4.34
		6.25%

REVENUES, EXPENSES AND RETURN AT INCREASED RATES.

The fair rate of return of 6.25% applied to the above determined rate base in the amount of $411,718,160. produces an allowable dollar annual return of $25,732,385. This exceeds the dollar annual return under the present rate of $16,642,336 (after giving effect to the 1965 tax rates) by $9,090,049. To produce this additional return will require additional gross revenues in the amount of $17,975,181.

Increase in return	$9,090,049
Increase in Excise & PUCO Maintenance	494,317
Increase in Federal Income Taxes	8,390,815
Total Increase in Revenues	$17,975,181

(24)

Revenues and expenses at the adjusted rate may then be summarized as follows:

Revenues	$159,296,412
Operating Expenses	104,089,528
Depreciation	3,650,519
Taxes other than Income	7,476,678
Income Taxes	18,347,302
Total Expenses	$133,564,027
Return	$ 25,732,385

ULTIMATE FINDINGS.

The Commission renders the following Ultimate Findings:

(1) That the application is filed pursuant to, and this Commission has jurisdiction thereof under the provisions of Sections 4909.17, 4909.18 and 4909.19 of the Revised Code of Ohio;

(2) That the investigation required of the Commission by the provisions of Section 4909.19 has been filed and served as required by law;

(3) That the Applicant's Statutory rate base for purposes of this proceeding is $411,718,160;

(4) That the fair annual rate of return on the previously ascertained rate base is 6.25%;

(5) That the dollar annual return to which this applicant is entitled for purposes of this proceeding is $25,732,385;

(6) That the allowable annual expense of the Applicant for purposes of this proceeding, including operating expenses, taxes and depreciation expenses aggregates $133,564,027;

(7) That the allowable annual revenue to which this

Applicant is entitled for purposes of this proceeding is $159,296,412;

(8) That this Commission is mindful of the fact that the use of the 1965 tax rates will not materially improve the Applicant's cash position until 1970, due to the statutory requirements enumerated below. Therefore, the company will be required to obtain new money for working capital.

INSTALLMENT PAYMENTS OF ESTIMATED INCOME TAX.

1. Former payment schedule:

Year	Present Year Sept.	Dec.	Following Year March	June
1963	25%	25%	25%	25%

11. Payment in effect for taxes after 1963:

Year	April	June	Sept.	Dec.	Following Year March	June
1964	1%	1%	25%	25%	24%	24%
1965	4%	4%	25%	25%	21%	21%
1966	9%	9%	25%	25%	16%	16%
1967	14%	14%	25%	25%	11%	11%
1968	19%	19%	25%	25%	6%	6%
1969	22%	22%	25%	25%	3%	3%
1970	25%	25%	25%	25%	—	—

(25) (9) The company has requested that this commission approve the fuel adjustment clause set forth in its proposed tariffs. The cities have objected to this request.

The commission believes there is merit in the proposal to adjust rates in relationship to the rates the company is legally obligated to pay for natural gas purchased. However, the commission is of the opinion that the form of fuel adjustment clause authorized by the commission in proceeding No. 28,636, The Dayton Power and Light Company, is a more accurate and equitable method than that proposed by the company herein. Therefore, applicant will be authorized to adopt the fuel adjustment provision outlined in Exhibit A attached hereto.

ORDER.

It is, therefore,

ORDERED, That in accordance with the Findings and Opinion herein set forth, the Applicant, The East Ohio Gas Company, be and hereby is, authorized to file with this Commission, for its approval, adjusted tariff schedules increasing the rates and charges to all residential and commercial consumers in its service areas, excluding Lake and Ashtabula Counties, which will provide additional revenues of $17,975,181. It is further

ORDERED, That Applicant, The East Ohio Gas Company, be and hereby is, authorized to file with this Commission, for its approval adjusted tariff schedules increasing the rates and charges to industrial consumers which shall not exceed the proportional share of the amount of $955,468 deducted from the City Gate Cost of Gas. (See Commission Exhibit 2B, Revised Schedule 2, Column 4.) It is further

ORDERED, That Applicant, The East Ohio Gas Company, file its Fuel Adjustment Clause upon the terms and conditions set forth in Exhibit A attached to this order.

THE PUBLIC UTILITIES COMMISSION OF OHIO
CARL R. JOHNSON,
Chairman,

J. WARREN BETTIS,
KENNETH B. JOHNSTON,
Commissioners.

EXHIBIT A.

Interstate Gas Adjustment and Refund Clause.

If at any time during the period this rate schedule is effective there should be a change in any of the filed interstate rates the Company is legally obligated to pay for gas purchased from the interstate rates the Company is legally obligated to pay on the date this rate schedule becomes effective, then the following shall be determined.

1. Determine the total dollars that would have been paid or have been payable by the Company during the twelve month period ended at the close of the month preceding such change in rates for gas purchased from all interstate suppliers at the rates in effect at the end of such twelve month period, and divide said total dollars by the total 1,000 cubic feet of gas sold during such period to all consumers to show an average interstate purchase cost per 1,000 cubic feet of gas sold (herein called "average interstate cost"); and

2. Determine the total dollars that would have been paid or have been payable by the Company during said twelve month period for gas purchased from all interstate suppliers, at the rates to be effective upon such change in rates, and divide such total dollars by the total 1,000 cubic feet of gas sold during such period to all consumers to show an adjusted average interstate purchase cost per 1,000 cubic feet of gas sold (herein called "adjusted average interstate cost").

For each full one-tenth cent per 1,000 cubic feet by which such adjusted average interstate cost decreases or increases below or above the average interstate cost, the foregoing rates as to each individual applicable consumer at each location shall be decreased or increased by one-tenth cent per 1,000 cublic feet effective as of the date

each applicable consumer's next subsequent bill is rendered on and after the first day of the third month following such change in interstate rates.

The Company shall file with The Public Utilities Commission of Ohio thirty days prior to the first day of the third month (herein called the "effective date") following such change in interstate rates the data as to such change in the interstate rates the Company is legally obligated to pay and a computation of the average interstate cost and adjusted average interstate cost resulting in such decrease or increase, together with a notice that the decreased or increased rates are to be placed in effect as to each applicable consumer at each location as of the date such applicable consumer's next subsequent bill is rendered on and after the effective date.

In the event the Company shall receive a refund from one or more of its suppliers in respect of any amounts the Company was legally obligated to pay for any volumes of gas purchased by it pursuant to interstate rates during the period commencing with the date this rate schedule becomes effective and ending on the date this rate schedule is terminated or superseded, such refund, including any interest paid in respect thereof, whether received during or after such period shall be passed on as follows:

1. The total dollar amount of any such refund received shall be multiplied by a percentage which is obtained by dividing the Company's sales to the applicable consumers during the twelve month period ended with the first of the month in which the refund is received by the Company's total sales to all its consumers during such twelve month period;

2. The amount of the refund so apportioned to the applicable consumers shall be divided by the total 1,000 cubic feet of sales to the applicable consumers during such twelve month period;

3. The amount per 1,000 cubic feet, to the nearest one-tenth cent, so determined shall be applied on the next succeeding bill or bills of the Company rendered on and after the first day of the third month following the receipt of such refund for sales to the then existing applicable consumers as a credit against the billing for each 1,000 cubic feet sold until the total credits so made to such consumers shall have equalled the total amount of such refund so apportioned to such consumers, provided, however, that if any such refund so apportioned would result in a credit on bills of less than one-tenth cent per 1,000 cubic feet the amount of the refund so apportioned need not be passed on until such apportioned amount of the refund and any apportioned amounts of subsequent refunds under the terms of this rate schedule enables a credit of at least one-tenth cent per 1,000 cubic feet.

The Company shall file with The Public Utilities Commission of Ohio not later than thirty days prior to the first day of the third month following the receipt of any refund a schedule showing the amount of such refund and any interest paid in respect thereof and the computation of the apportionment of such refund together with all necessary data therefor.

APPENDIX B.

FINDINGS AND ORDER OF THE PUBLIC UTILITIES COMMISSION.

(Entered November 23, 1964.)

The Commission, now coming to consider the amended tariff schedules submitted to the Commission pursuant to its order issued November 20, 1964, in this proceeding, finds:

That said amended tariff schedules as submitted will not provide an annual dollar return greater than that found by the Commission in its order dated November 20, 1964.

It is, therefore,

ORDERED, That applicant, The East Ohio Gas Company, be and hereby is authorized to file said amended tariff schedules. It is further

ORDERED, That said amended tariff schedules shall become effective at the next billing date after the date of this order.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
CARL R. JOHNSON, *Chairman,*
J. WARREN BETTIS,
KENNETH B. JOHNSTON,
Commissioners.

APPENDIX C.

OPINION OF THE SUPREME COURT OF OHIO.

Public utilities—Gas rates—Application for modification of—Pipe depreciation—Approval of "random-sampling plan" discretionary with commission—Commission's staff report evidence in case—Fixing of uniform area-wide rates not unreasonable, when—Differences in customer classification or location disregarded, when—Commission's approval of cost of fuel escalation clause—Not delegation of power to set rates.

1. The allowance by the Public Utilities Commission of an application by a party to a rate case for an order approving a "random-sampling plan" for the inspection of underground pipe installations for the purpose of preparing evidence relative to existing actual pipe depreciation is within the discretion of the commission and is not prejudicial especially where the result of such inspection is not binding upon the commission or any interested party so as to preclude introduction of other evidence in this same area of inquiry.

2. Where there is a lack of evidence of cost factors peculiar to any part of the service area of a utility engaged in the distribution of natural gas or to any class of consumers within such service area, the fixing of uniform area-wide rates by the commission is not unreasonable and unlawful.

3. Within the same utility service area and assuming the absence of factors producing grossly disproportionate cost to produce or deliver the utility product, minor differences in customer classification or customer location may be disregarded.

4. The approval by the Public Utilities Commission of the inclusion of a cost of fuel escalation clause in a com-

mission order approving an adjustment of tariff schedules is not an unconstitutional delegation by the commission of its power to set rates.

(Nos. 39381 and 39385—Decided March 23, 1966.)

APPEALS from the Public Utilities Commission.

On August 1, 1961, the East Ohio Gas Company, pursuant to Sections 4909.17, 4909.18 and 4909.19, Revised Code, filed an application to modify its existing rates for natural gas. The application sought authority to revise and increase rates over the service area of the company (all of which is located in northeastern Ohio) except for that part of the system which is located in Lake and Ashtabula Counties. Lake and Ashtabula Counties contain 23 municipalities which, together with the adjacent rural areas of each, are served by the company while the remaining customers of the company reside in 108 other incorporated municipalities in northeastern Ohio or in the rural areas adjacent to each of those communities. The application excludes the Lake and Ashtabula County operations because some of the municipalities in those areas had formal contracts with East Ohio which could not be cancelled.

Prior to the application there had been a long-established policy based upon the character of the service area of East Ohio of maintaining uniform rates within such service area. Rates of customers in the rural areas adjacent to the various communities were customarily adjusted to the rates of those communities by arrangements approved by the Public Utilities Commission.

The application of the company complied with Section 4909.17 *et seq.*, Revised Code, and notice of its filing was duly published as required by law. The investigation of the facts set forth in the application was made by the com-

mission, and its staff report was filed and served according to law.

Of the 108 municipalities and 13 Ohio counties whose mayors and prosecuting attorneys were served with copies of the staff report, 26 filed objections, but only representatives of the cities of Akron, Canton, Cleveland and Massillon appeared when the hearings on the merits began.

Hearings on the application commenced on July 9, 1963, continued through 113 days and involved 11,692 pages of testimony. The commission received and considered 264 exhibits. The commission made its finding and issued its order on November 20, 1964, authorizing the company to file for approval adjusted tariff schedules increasing rates. The order also authorized a cost of gas escalation formula to be used by the company in adjusting customer charges under commission supervision to the rates the company is legally obligated to pay for gas purchased under filed interstate tariffs.

On November 23, the commission issued its order approving the tariff filings made pursuant to the findings and order of November 20, 1964.

Within the statutory 30 days following the commission's final orders, applications for rehearing were filed, one by the cities of Canton, Cleveland and Massillon and one by the city of Akron. These two applications, claiming some 330 errors on the part of the commission, were the only applications for rehearing filed. They were overruled. Notice of appeal was filed jointly by the cities of Canton, Cleveland and Massillon. A separate notice of appeal was filed by the city of Akron. The separate appeals will be considered together, and the judgment here will be dispositive of both appeals.

Mr. R. C. Sheppard, director of law, *Mr. Robert J. White, Messrs. Steer, Strauss, White & Tobias* and *Mr. James J. Ryan*, for appellant in case No. 39381.

Mr. Harold E. DeHoff, Mr. Richard G. Reichel, Mr. Bronis J. Klementowicz and *Mr. James L. Harkins, Jr.*, for appellants in case No. 39385.

Mr. William B. Saxbe, attorney general, *Mr. Theodore K. High* and *Mr. Clark G. Redick*, for appellee Public Utilities Commission.

Messrs. Jones, Day, Cockley & Reavis, Mr. Walter J. Milde, Mr. James E. Courtney and *Mr. Thomas G. Roderick*, for appellee East Ohio Gas Company.

BROWN, J. Two matters decided by the commission preliminary to the hearing on the merits are assigned as error by the appellants.

The first of these concerns the overruling on August 28, 1961, of the motion by Akron, Cleveland and Massillon that the company's application be dimissed as prematurely filed.

The second concerns the preliminary order approving a random-sampling plan proposed by the company as one means of preparing evidence to be presented as to depreciation of the company's pipe, a large part of its inventory.

Although specifically assigned as error, the overruling of the first of these motions was neither argued nor briefed and will be considered abandoned.

The second of these preliminary orders was commented upon by this Court in *City of Canton v. Pub. Util. Comm.*, 174 Ohio St. 373. That case held that, in view of the limitations on use of the result of the random sampling as evidence, the order affected no substantial rights of the parties, was not a final order, and, hence, was not appealable. However, it was there observed and is here

determined that that order merely approved one means of presenting evidence as to depreciation of part of the company's inventory. The result of such random sampling was not made dispositive of this area of inquiry.

In their brief in the instant cause the cities merely renew their complaint made in the *City of Canton case*, fortified with the argument that they were not given time or opportunity to be heard in opposition to the random-sampling plan. It is difficult to see how the introduction of the result of the sampling, considering the limitations of its use as evidence, can be considered prejudicial to the cities.

Such objection at this time is referrable only to the weight of the evidence under appellants' complaint that they were not entitled to and were not given "due process of law."

The cities' briefs contain varied complaints. Among these are limitations of time to prepare and present evidence or to prepare and present briefs or arguments at various points in the proceedings. The length of time consumed by these hearings has been stated. It is observed throughout the record that extreme latitude was granted to counsel for the cities at all times. One company witness was cross-examined for 33 days. In view of these observations, we cannot agree with so much of the claim of lack of due process as is attributed to limitations of time imposed by the commission upon the cities. Orders granting or refusing continuance as well as orders setting time for argument or time for filing briefs generally rest in the sound discretion of the trial court or, as in this cause, in the sound discretion of the commission. *Norton v. Norton*, 111 Ohio St. 262; *State, ex rel. Buck, v. McCabe et al., Judges*, 140 Ohio St. 535; *Moran Towing & Transportation Co., Inc., v. Conners-Standard Marine Corp.*, 285 F. 2d

368; *Federal Communications Comm. v. WJR, The Goodwill Station, Inc.*, 337 U. S. 265.

We have reviewed the rulings made and the time allowed by the commission as disclosed by the record. Neither the rulings nor orders called to our attention nor the overall record indicates an abuse of discretion.

Argued in the brief as showing a lack of due process were specific rulings of the court admitting evidence offered by the company over objection by the cities and rulings of the commission excluding evidence offered by the cities either upon objection or *sua sponte*. Lumped with these specific objections were arguments that the commission's failure to rely upon the opinions of the cities' experts admitted and/or the commission's exclusion of the opinions of the cities' experts in matters concerning reproduction-cost-new of the inventory and/or the commission's greater reliance upon the report of its own staff or company witnesses in this area somehow amounted to lack of due process.

The qualifications of an expert is a matter for determination by the trier of the facts and "rulings with respect to such matters will ordinarily not be reversed unless there is a clear showing that the court abused its discretion." *Ohio Turnpike Commission v. Ellis*, 164 Ohio St. 377, 386. An expert must be qualified in the matters about which he is to testify. *State v. Auerbach*, 108 Ohio St. 96. Such rulings by the commission can seldom be considered an abuse of discretion. *Westinghouse Electric & Mfg. Co. v. Denver Tramway Co.*, 3 F. Ed. 285.

The remainder of the appellants' contentions and arguments in this area relate to judgments by the commission in weighing the evidence. This court has repeatedly held that it will not substitute its judgment for that of the commission as to conclusions drawn from evidence, unless

the findings and order of the commission are manifestly against the weight of the evidence or there is no evidence. *City of Kenton v. Pub. Util. Comm.*, 3 Ohio St. 2d 71, 73. There is evidence supporting all aspects of the order appealed from and no finding of the commission is against the manifest weight of the evidence.

The objection made by the cities to the introduction of the staff report was based upon the absence of Hampton, a former commission employee under whose supervision much of the work of preparing the staff report was done and whose opinions and judgments made up substantial portions of the report.

The staff report, prepared as required by Section 4909.19, Revised Code, was competent evidence in this cause. *Lindsey v. Pub. Util. Comm.*, 111 Ohio St. 6.

Manifestly, the staff report does not need "testimonial support" as the cities contend. See, also, *City of Marietta v. Pub. Util. Comm.*, 148 Ohio St. 173.

The burden of opposing this evidence rests with the cities. They must present evidence that is credible, authoritative and challenging. See *City of Columbus v. Pub. Util. Comm.*, 154 Ohio St. 106; *City of Cleveland v. Pub. Util. Comm.*, 164 Ohio St. 442.

The problem of allocation of rate base is raised by the appellants. The claim originally made in the notices of appeal was tied to the alleged failure of the staff report to break down the total value of the company's property into its value by counties as required by Section 4909.06, Revised Code. Additional complaint was made as to the invalidity of the staff report. These complaints were again based upon the "lack of testimonial support" of this document by former commission employee Hampton.

The problem of allocation has been referred to as a "controversial" problem. *Ohio Edison Co. v. Pub. Util.*

Comm., 173 Ohio St. 478. In that case, the validity of a rate set by ordinance of the city of Mansfield was in question. It became material to determine how that part of the company's property which made up the system-wide rate base and the expenses connected therewith should be allocated among the various areas using Ohio Edison electricity and especially how they should be allocated to the city of Mansfield.

In the present situation, the entire system except for Lake and Ashtabula Counties is included in the new rate. Such allocation as needed to be made has been made on the basis of evidence in the record.

In its opinion the commission points out: "It should be observed that the exhibits filed with said application include both the municipalities and adjacent rural areas except Lake and Ashtabula Counties. (EOx13) The pipe inspections and evidence thereon under the random-sampling plan authorized by the commission related to all property in the service area of the company except Ashtabula and Lake Counties."

It is apparent that the problem of allocating rate-base valuation is much less severe in this cause than it was in *Ohio Edison v. Pub. Util. Comm., supra.* As the percentage of a utility's total property, which makes up its system-wide rate base and which is attributable to the area in which a rate revision is being sought, increases, the severity of the problem of allocation decreases.

Additionally, we note the total lack of evidence in the record from any party of any cost-causing factor peculiar to any specific portion of the service area under consideration or as to any class of consumers within the service area.

Such evidence if present would function not to disprove the reasonableness of the rate set but would function to disprove the reasonableness of any area rate.

Within the same utility-service area, assuming the absence of factors producing grossly disproportionate cost to produce or deliver the utility product, minor differences in customer classification or customer location may be disregarded.

It is argued that the commission set an unreasonable rate of return. The rate of return allowed in the order appealed from is 6.25%. The commission's determination that that rate was fair is a factual determination based upon evidence.

One of the two witnesses for the cities in this matter testified that a reasonable rate of return on the company's rate base would be 5.17%. The other stated as his judgment that a reasonable rate of return would be 5.39%. Each of these witnesses, in arriving at his judgment in this matter, based his estimate of the cost of equity upon price-earnings ratio, and appellants argue that "the commission was arbitrary and capricious in choosing its own 'enlightened judgment' over the actual facts of the money markets."

The company's witnesses on the other hand buttressed their opinions that current price-earnings ratios are of little or no significance by pointing to the fact that price-earnings ratio of stocks included in the Dow-Jones industrial averages was only 5.2% in mid-1963 with a yield of only 3.3%, while at the same time the earning-price ratio of 35 selected gas distribution companies was 5.9% with a dividend yield of 3.8%. The company takes the position that these figures demonstrate either that the riskier a business is the lower must be its rate of return or that earnings-price ratios can not be depended upon as a measure of reasonable rate of return unless an adjustment is made to increase the incentive to the buyer. That is to say a growth factor must be added since stock buyers buy prospective rather than current earnings.

The company's experts pointed out that stock splits and stock dividends of the shares of the gas companies used by the cities' expert in his study of ratios disclose that if price is adjusted for these shares to exclude realized growth between the years 1960 and 1963 the earnings would average between 8% and 9%.

On this basis it is argued that this is the rate of growth which gas utility company investors have received in the past and will expect in the future.

The two conflicting views are to some extent irreconcilable, yet the judgment to be made as to the reasonableness of the rate of return allowable to this industry with this rate base under these circumstances is a "judgment figure established by the Public Utilities Commission in the exercise of its administrative *expertise*." See *Ohio Fuel Gas Co. v. Pub. Util. Comm.*, 174 Ohio St. 585, 602.

The rate of return allowed by the commission is not unreasonable, was not arrived at in an unlawful manner, nor is it against the weight of the evidence.

The "gas escalation clause" which is approved in connection with the order dated November 20, 1964, is attacked by the cities upon two grounds. It is claimed that the inclusion of any gas escalation clause in the commission's order is an unconstitutional delegation by the commission of its power to set rates. It is claimed that if such escalation clauses are not unlawful for this reason then this particular escalation clause is so vague that the commission's action in approving its use was "arbitrary and capricious."

It is noted that this court approved a similar escalation clause in *City of Cleveland v. Pub. Util. Comm.*, 3 Ohio St. 2d 82. The record discloses that the claim of vagueness is without factual basis. Permitting an escalation clause has the effect of eliminating one of the variables

which would otherwise distort the dollar amount of earnings which the commission's order contemplates will be reasonable and which will result from the application of the approved rate of return (6.25%) to the reconstruction-cost-new-less-depreciation inventory value as determined by the order appealed from.

Also as shown by the record in this cause, the presence of the escalation clause here results in a lowering of the rates charged to the subscribers due to a reduction which occurred in the cost of gas furnished by the company as a result of a rate reduction authorized by the Federal Power Commission effective on October 1, 1964.

We are unable to see how the appellants can complain that prejudice occurred when the commission disregarded the cities' evidence of the cost of gas and chose to approve tariffs based upon reduced cost, which resulted from a subsequent order of a government agency, of which order the commission could properly take judicial notice. *London & Lancashire Indemnity Co. of America v. Board of Commrs. or Columbiana County,* 107 Ohio St. 51; *Black v. City of Berea,* 137 Ohio St. 611. See, also, *Citizens Gas Users Assn. v. Pub. Util. Comm.,* 165 Ohio St. 536.*

The appellant cities claim that the commission by its order "has burdened the ratepayer with an excessive cost of federal income tax." The commission's order recites that in computing tax the commission used the 1965 tax rate of 48% rather than the rate of 52% which was in effect during the test period. This is to the advantage of

---

* See "Escalator Clauses in Public Utility Rate Schedules" by R. S. Trigg, 106 University of Pennsylvania Law Review, 964. In this comprehensive review of the usefulness of such clauses in regard to fuel costs of utilities, it is commented that every political jurisdiction in this country has escalator clauses in the published tariffs of its utilities, and that such clauses result in reduced rate litigation, hence, lower costs of administration.

the ratepayers and is proper under the holding of this court in *East Ohio Gas Co. v. Pub. Util. Comm.*, 133 Ohio St. 212.

A review of the record and of the commission's findings indicates that the allowance for federal income taxes as a cost of service was computed by applying 1965 rate to the allowed annual dollar return as ordered by this court in *General Telephone Co. v. Pub. Util. Comm.*, 174 Ohio St. 575.

In view of this fact, the complaint of the appellants that no allowance was made for savings on federal income tax experienced through filing with its parent company of a joint tax return is without merit.

The brief of the *amici curiae*, the Beldon Brick Company and others, is an attempt by one not a party to these appeals to inject an issue which is not before the court at this time. On appeal from an order of the Public Utilities Commission, this Court has no power to consider any matter which was not contained in an application for rehearing. *City of Cincinnati v. Pub. Util. Comm.*, 151 Ohio St. 353, paragraph 17 of the syllabus.

Since this Court is of the opinion that the order of the commission is not unreasonable or unlawful, it is affirmed.

Order affirmed.

TAFT, C. J., ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT and SCHNEIDER, JJ., concur.

APPENDIX D-1.

JUDGMENT OF THE SUPREME COURT OF OHIO.

(Entered March 23, 1966.)

This cause, here on appeal from the Public Utilities Commission, was heard in the manner prescribed by law. On consideration thereof, the order of the Public Utilities Commission is affirmed for the reasons stated in the opinion herein.

APPENDIX D-2.

MANDATE OF THE SUPREME COURT OF OHIO.

(Entered March 23, 1966.)

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Order of the Public Utilities Commission is affirmed for the reasons stated in the opinion rendered.

APPENDIX E.

ARTICLE FROM THE AMERICAN ENGINEER, MAY, 1965.

IOWA CONSULTING ENGINEER TO RECEIVE 1965 NSPE AWARD

A prominent consulting engineer, author, public speaker, businessman, world traveler, and advocate of world peace was chosen to receive the 1965 NSPE Award for outstanding service to the engineering profession. He is C. Maxwell Stanley, P.E., president of Stanley Engineering Company in Muscatine, Iowa.

Mr. Stanley was born in Corning, Iowa, in 1904 and educated at the State University of Iowa, where he was awarded the degree of B.S. in general engineering in 1926 and M.S. in hydraulic engineering in 1930.

His career as a professional engineer has been marked not only by engineering contributions of note, but also by significant contributions to the advancement of the engineering profession and the practice of consulting engineering. In addition he has made major contributions to the public welfare and has taken time for service to his community, the nation, and the world.

After graduation Mr. Stanley did engineering work in the hydraulic and hydroeletric fields for the Byllesby Engineering and Management Company and the Management and Engineering Corporation. In 1932 he became a consulting engineer as half owner and general manager of Young and Stanley, Inc., which in turn became Stanley Engineering Company in 1939. Starting as a two-man organization, he expanded the company into an operation with a staff of 300, including 112 professional engineers. It has formed two subsidiaries: Stanley Engineering Company of Africa, and Stanley International Limited. Eighteen of the company's professional engineers are stationed overseas.

Mr. Stanley has not only activated the growth of his own company, but has also continued to contribute his engineering talents to many of the major projects handled by the firm, particularly in the fields of power and water resources. He is a registered professional engineer in sixteen states and the District of Columbia, and holds a certificate under the National Bureau of Engineering Registration. He has authored some 50 technical and professional papers and has appeared as speaker before many groups. He has done much to advance the understanding of the consulting engineering profession. He is author of *The Consulting Engineer*, the first book in the United States dealing fully with the professional aspects of private practice.

Mr. Stanley's contributions to community, national and world affairs have also been manifold. He was one of the organizers and the first president of the Muscatine Development Commission. He has served on the Board of Trustees of Iowa Wesleyan College since 1950, and as chairman since 1962. Wesleyan awarded him a Doctor of Humane Letters degree in 1961.

His interest in world peace and world government led to membership, chairmanship, and presidency of the United World Federalists and to membership and chairmanship of the Executive Council of the World Association of World Federalists. He has spoken widely on subjects related to foreign policy and has participated in many conferences and committees concerned with the subject throughout the United States and abroad. He is also active in the Division of Peace and World Order of the Methodist Church, the Strategy for Peace Conference, and the Commission to Study Organization of Peace, sponsored by the American Association for the United Nations. As a re-

sult of these interests and his extensive world travels, Mr. Stanley wrote a book entitled *Waging Peace,* giving a businessman's look at United States foreign policy.

Mr. Stanley has devoted much time and great efforts to the professional problems of engineers. His membership in the American Society of Civil Engineers, the American Society of Mechanical Engineers, the Institute of Electrical and Electronics Engineers, NSPE, the Consulting Engineers Council, and the Iowa Engineering Society and the high offices he held in several of these have given him the opportunity to keep abreast of the many developments within the profession.

He believes that to earn the title "professional engineer" a man must not only be competent but socially responsible, and during some thirty years of private practice he has used the Stanley Engineering Company as a proving ground for many of his concepts. He believes that there is no greater need than for the consulting engineers themselves to understand and accept the broader role available to them both professionally and as responsible citizens.

His outstanding achievements in professional and technical as well as civic affairs have earned him the Anson Marston Award for Outstanding Service and the Distinguished Service Award of the Iowa Engineering Society. His technical papers have merited the Alfred Noble prize, the Collingwood prize of the ASCE, and the John Dunlap Award of the Iowa Engineering Society.

Mr. Stanley is the 15th recipient of the NSPE award since it was first presented in 1949. The list of recipients includes such engineers as Herbert Hoover, Davis B. Steinman, Charles F. Kettering, Nathan W. Dougherty, Leif J. Sverdrup, and Charles Stark Draper. The award will be

presented at a banquet on July 3rd during the NSPE Annual Meeting in Albuquerque, New Mexico.

THE AMERICAN ENGINEER
May, 1965.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 18 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966
No. 255

THE CITIES OF CANTON, CLEVELAND, AND MASSILLON, OHIO,
Petitioners,
vs.
THE PUBLIC UTILITIES COMMISSION OF OHIO
and
THE EAST OHIO GAS COMPANY,
Respondents.

BRIEF OF RESPONDENT, THE PUBLIC UTILITIES COMMISSION OF OHIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

WILLIAM B. SAXBE,
Attorney General of Ohio
State House Annex
Columbus, Ohio 43215
Counsel for Respondent, The Public Utilities Commission of Ohio.

J. PHILIP REDICK,
LANGDON D. BELL,
Assistant Attorneys General
111 North High Street
Columbus, Ohio 43215
Of Counsel

THE JUDSON-BROOKS COMPANY—CLEVELAND

TABLE OF CONTENTS

	Page
I. STATEMENT	1
II. ARGUMENT	2

TABLE OF AUTHORITIES

Cases

	Page
Brooklyn Union Gas Co. v. City of New York, 50 Misc. 450, 100 N.Y. Supp. 570, affirmed Appellate Division at 115 App. Div. 69, 100 N.Y. Supp. 625, affirmed New York Court of Appeals at 188 N.Y. 334, 81 N.E. 141	6
Neblett v. Carpenter, 305 U.S. 297, 83 L.ed. 182, 59 S. Ct. 170, reh. den., 305 U.S. 675, 83 L.ed. 437, 59 S. Ct. 335	3
Ohio Bell Telephone Co. v. Commission, 301 U.S. 292, 81 L.ed. 1093	6
Smith v. Illinois Bell Telephone Company, 270 U.S. 587	5
Southwestern Bell Telephone Company v. Oklahoma, 303 U.S. 206	2
Williams v. Mayor of Baltimore, 289 U.S. 36	4

Statutes

	Page
Ohio Revised Code § 4909.19	4

In the Supreme Court of the United States

OCTOBER TERM, 1966
No. 255

THE CITIES OF CANTON, CLEVELAND, AND MASSILLON, OHIO,
Petitioners,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO
and
THE EAST OHIO GAS COMPANY,
Respondents.

BRIEF OF RESPONDENT, THE PUBLIC UTILITIES COMMISSION OF OHIO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT

This brief is filed in opposition to the Petition for Writ of Certiorari to the Supreme Court of Ohio of the Cities of Canton, Cleveland, and Massillon, Ohio, whereby these Cities petition this Court to review the decision of the Supreme Court of Ohio in the Cities of Akron, Canton, Cleveland and Massillon, Ohio, v. Public Utilities Commission of Ohio, The East Ohio Gas Company, 5 Ohio St. 2d 237. It shall be the purpose of this brief to demonstrate that the Supreme Court of Ohio was never required to decide a federal question. As a consequence, the Petition is without merit, raises no basis upon which to invoke this Court's jurisdiction and should be denied.

ARGUMENT

The Petition for Writ of Certiorari (hereinafter called the Petition) should be denied due to the fact that the Supreme Court of Ohio (hereinafter sometimes called the Ohio Court) did not decide any federal question for a decision of the federal question wasn't necessary to the determination of the case. It must affirmatively appear from the record not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the case, *Southwestern Bell Telephone Company v. Oklahoma*, 303 U.S. 206, 212-213.

Why wasn't a federal question decided by the Ohio Court? Because the Ohio Court did not find any federal constitutional question presented for its consideration. That Court found (Appendix C at page 65-66 of the Petition) as follows:

> "We have reviewed the rulings made and the time allowed by the commission as disclosed by the record. Neither the rulings nor orders called to our attention nor the overall record indicates an abuse of discretion.
>
> "Argued in the brief as showing a lack of due process were specific rulings of the court admitting evidence offered by the company over objection by the cities and rulings of the commission excluding evidence offered by the cities either upon objection or *sua sponte. Lumped with these specific objections were arguments that the commission's failure to rely upon the opinions of the cities' experts admitted and/or the commission's exclusion of the opinions of the cities' experts in matters concerning reproduction-cost-new of the inventory and/or the commission's greater reliance upon the report of its own staff or company*

witnesses in this area somehow amounted to lack of due process. . . .

"The remainder of the appellants' contentions and arguments in this area relate to judgments by the commission in weighing the evidence. This court has repeatedly held that it will not substitute its judgment for that of the commission as to conclusions drawn from evidence, unless the findings and order of the commission are manifestly against the weight of the evidence or there is no evidence. *City of Kenton v. Pub. Util. Comm.*, 3 Ohio St.2d 71, 73. *There is evidence supporting all aspects of the order appealed from and no finding of the commission is against the manifest weight of the evidence.*" (Emphasis added.)

The Court (Appendix C at page 64 of the Petition) also stated:

"It is observed throughout the record that *extreme latitude was granted to counsel for the cities at all times.*". (Emphasis added.)

From the foregoing it is clear that the Ohio Court has decided the case on the basis of state law and this Court has held that it is without jurisdiction on certiorari to review holdings of state courts which solely concern matters of state law. *Neblett v. Carpenter*, 305 U.S. 297, 83 L.ed. 182, 59 S. Ct. 170, reh. den., 305 U.S. 675, 83 L.ed. 437, 59 S. Ct. 335.

The Cities in their Petition alleged that the question before this Court is of national importance and to give import to their position, the Cities have apparently claimed several roles, as cities, as ratepayers, and as representatives of ratepayers within their particular municipal boundaries.

Even a cursory reading of the Fourteenth Amendment to the Constitution of the United States would cast doubt upon the right of a city to assert any right under it to due

process of law. That amendment, setting forth prohibitions against states, in pertinent part is:

> "* * *, nor shall any state deprive any person of life, liberty or property, without due process of law, * * *"

Cities are created by, creatures of, and political subdivisions of, the state. Thus,

> "A municipal corporation created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."

Williams v. Mayor of Baltimore, 289 U.S. 36, 40.

The heart of the Cities' due process of law for ratepayers argument is that in some fashion due process of law was deprived them by the "arbitrary action" of The Public Utilities Commission of Ohio in utilizing a Staff Report prepared in some part by a member of its Staff, Mr. Paul R. Hampton, who subsequently left its employment. The Ohio Court, in considering questions relating to the Staff Report (Appendix C at page 66 of the Petition) stated:

> "The staff report, prepared as required by Section 4909.19, Revised Code, was competent evidence in this cause. *Lindsey v. Pub. Util. Comm.*, 111 Ohio St. 6.
>
> "Manifestly, the staff report does not need 'testimonial support' as the cities contend. See, also, *City Marietta v. Pub. Util. Comm.*, 148 Ohio St. 173.
>
> "The burden of opposing this evidence rests with the cities. They must present evidence that is credible, authoritative and challenging. See *City of Columbus*

v. Pub. Util. Comm., 154 Ohio St. 106; *City of Cleveland v. Pub. Util. Comm.*, 164 Ohio St. 442."

Certainly, as we have stated above, the Ohio Court did not find it necessary to base its decision on a federal question, but rather upon the lack of credible, authoritative and challenging evidence presented by the Cities. Where is the "national importance"? Was the Staff Report some sort of hidden document? On the contrary, 108 municipalities and 13 Ohio Counties were served with copies of the Staff Report and only 26 filed objections and only the Cities of Akron, Canton, Cleveland, and Massillon appeared when the hearings on the merits began. (See Appendix C at page 62 of the Petition.) Assuming for the sake of argument that the Cities' position is correct, what would be the end result? The Cities argue that each ratepayer should be entitled fully to participate at public utility hearings with all the attendant safeguards which must be granted to the public utility whose property is subject to confiscation. East Ohio Gas alone numbers among its consumers over 800,000 consumers in the area affected by the rate proceeding. Should each consumer be entitled to such participation at public utility hearings? Certainly not. The process would be so cumbersome and unwieldy that the effectiveness of all state regulatory agencies would be at an end. Would due process of law be served? No. If each consumer spent only one day to conduct cross-examination, put in his, hers or its direct case, in argument and other aspects of the proceeding, the Commission hearings would have lasted approximately 800,000 days or well over 2,000 years. Such a procedure would make rate regulation not only unworkable but also clearly unconstitutional. Rates could never be set for the utility service. In *Smith v. Illinois Bell Telephone Company*, 270 U.S. 587, at 591, the United States Supreme Court laid down the simple common sense proposition that:

"Property may be effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them; * * *."

The position of the ratepayer in a public utility hearing is summarized in *Brooklyn Union Gas Co. v. City of New York*, 50 Misc. 450, 100 N. Y. Supp. 570, affirmed by the Appellate Division at 115 App. Div. 69, 100 N. Y. Supp. 625, affirmed by the New York Court of Appeals at 188 N. Y. 334, 81 N.E. 141, as follows (100 N. Y. Supp. at page 578):

"The distinction between the right of the public utility corporation and the consumer to review legislative action fixing rates is that, in the case of the former, constitutional rights may be affected by an unreasonable rate. In the case of the latter they cannot be. The consumer is not left under such circumstances at the mercy of a public utility corporation. But he must seek his protection through the Legislature and not through the courts."

Finally, the Cities allege that the Commission acted contrary to the holding of this Court in *Ohio Bell Telephone Co. v. Commission*, 301 U.S. 292, 81 L.ed. 1093. Nothing could be further from the truth. In the *Bell* case, the Court (81 L.ed. at page 1099) stated what course of events leads to a denial of due process.

"* * * Without warning or even the hint of warning that the case would be considered or determined upon any other basis than the evidence submitted, the Commission cut down the values for the years after the date certain upon the strength of information secretly collected and never yet disclosed. The company protested. It asked disclosure of the documents indicative of price trends, and an opportunity to examine them, to analyze them, to explain and to rebut

> them. The response was a curt refusal. Upon the strength of these unknown documents refunds have been ordered for sums mounting into millions, the Commission reporting its conclusion, but not the underlying proofs. The putative debtor does not know the proofs today. This is not the fair hearing essential to due process. It is condemnation without trial."

That is not the case here. As stated above, all parties involved received a copy of the Staff Report in question. Where the valuations adopted by the Commission were based on trends, the trends used were specifically included in the record and subject to considerable cross-examination and in many instances were the basis of the valuation evidence submitted by the Cities. The failure was upon the part of the Cities in not presenting "credible, authoritative and challenging" evidence, and nothing more.

For all of the foregoing reasons it is respectfully submitted that the Petition presents no basis upon which to invoke this Court's jurisdiction on certiorari and should be denied.

Respectfully submitted,

WILLIAM B. SAXBE,
Attorney General of Ohio
State House Annex
Columbus, Ohio 43215

Counsel for Respondent,
The Public Utilities
Commission of Ohio

J. PHILIP REDICK,
LANGDON D. BELL,
Assistant Attorneys General
111 North High Street
Columbus, Ohio 43215

Of Counsel

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
COUNTER-STATEMENT OF THE CASE	2
A. The Nature of the Proceedings	2
B. The Valuation Fixed by the Ohio Commission and Approved by the Supreme Court of Ohio	6
ARGUMENT	9
CONCLUSION	13

TABLE OF AUTHORITIES

Cases

	Page
City of Canton v. Public Utilities Commission of Ohio, 174 Ohio St. 373, 189 N.E.2d 126 (1963)	3
City of Cleveland v. Public Utilities Commission of Ohio, 164 Ohio St. 442, 132 N.E.2d 216 (1956)	3
Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio, 301 U.S. 292 (1937)	12
Lynch v. New York ex rel Pierson, 293 U.S. 52 (1934)	12

Statutes

	Page
Ohio Revised Code:	
§ 2317.37	10
§ 2317.43	10
§ 4903.04	10
§ 4903.06	11
§ 4903.11	5
§ 4909.04	3
§ 4909.05	3
§ 4909.15	3
§ 4909.18	3
§ 4909.19	3, 4, 6
28 U.S.C. § 1257	2, 12

Other

	Page
Rule 1.15, Code of Rules and Regulations of The Public Utilities Commission of Ohio (1962)	10
Rule 19(a) of the Supreme Court of the United States	2
Rule 23(e) of the Supreme Court of the United States	2
Rule 23(f) of the Supreme Court of the United States	11
5 WIGMORE, EVIDENCE § 1371 (3d ed. 1940)	9

In the Supreme Court of the United States

October Term, 1966
No. 255

THE CITIES OF CANTON, CLEVELAND AND MASSILLON
Petitioners,

v.

THE PUBLIC UTILITIES COMMISSION OF OHIO
and
THE EAST OHIO GAS COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF OF RESPONDENT THE EAST OHIO GAS COMPANY IN OPPOSITION

OPINIONS BELOW

The Findings and Order of The Public Utilities Commission of Ohio ("Ohio Commission") dated November 20, 1964, are attached to the Petition herein filed by the Cities of Canton, Cleveland and Massillon, Ohio ("Cities' Petition") as Appendix A. The Findings and Order of the Ohio Commission dated November 23, 1964, are attached to the Cities' Petition as Appendix B.

The opinion of the Supreme Court of the State of Ohio affirming the Ohio Commission's foregoing Orders is attached to the Cities' Petition as Appendix C and is reported as *City of Akron v. Public Utilities Commission of Ohio, City of Canton v. Public Utilities Commission of Ohio*, Nos. 39381 and 39385, at 5 Ohio St. 2d 237 and 215 N.E.2d 366 (1966).

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 23, 1966. The Cities' Petition herein was filed on June 20, 1966. It seeks to invoke the jurisdiction of this Court under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

The Cities' Petition asserts that the question presented for review is (Cities' Petition, p. 3):

> "Are rate payers entitled to due process of law in the setting of rates by State regulatory bodies?"

This is purely an abstract question. It was never ruled on by the Supreme Court of Ohio. The only question presented by the Cities' Petition is:

> Did the Supreme Court of Ohio err in holding that the November, 1964, rate fixing orders of the Ohio Commission were not against the manifest weight of the evidence?

This is not "a federal question of substance" (Rule 19(a)).

COUNTER-STATEMENT OF THE CASE

The "Statement of the Case" contained in the Cities' Petition (pp. 3-12) fails to set forth a concise statement of the case containing the facts material to the consideration of the question presented (Rule 23(e)). The facts are as follows:

A. The Nature of the Proceedings

The East Ohio Gas Company ("East Ohio") is a state-regulated public utility serving natural gas to consumers in and adjacent to 131 incorporated municipalities located in 13 counties in northeastern Ohio, the largest of which are Cleveland, Akron, Canton and Youngstown. The pro-

ceedings with which the petition herein is concerned commenced on August 1, 1961, when East Ohio filed with the Ohio Commission an application for increased rates covering consumers in and adjacent to 108 of the municipalities served, being all the territory served by East Ohio except that located in Lake and Ashtabula Counties, Ohio.

Ohio rate making law requires the Ohio Commission to make a finding of a gross valuation of the properties involved from which is subtracted existing depreciation to arrive at the statutory rate base. This rate base is then multiplied by a fair and reasonable rate of return for the utility. The resulting annual return, when added to the reasonable annual expenses of the utility, including taxes, is the allowable gross annual revenues which the rates fixed by the Ohio Commission must yield. (Ohio Rev. Code §§ 4909.04, 4909.05 and 4909.15; *City of Cleveland v. Public Utilities Commission of Ohio*, 164 Ohio St. 442, 132 N.E.2d 216 (1956)).

East Ohio's application, as required by Ohio Rev. Code § 4909.18, contained its appraisal of the value of the properties involved and a statement of its operating costs and other expenditures and its proposed new rates.

Following the filing of East Ohio's application there were various preliminary proceedings, including proceedings to determine a method of selecting locations for the inspection of East Ohio's underground pipe lines, which ended in the Supreme Court of Ohio. *City of Canton v. Public Utilities Commission of Ohio*, 174 Ohio St. 373, 189 N.E.2d 126 (1963); see Cities' Petition, App. C. pp. 63-64.

Throughout the period of these preliminary proceedings the Ohio Commission, through its staff, was making the investigation required by Ohio Rev. Code § 4909.19 which in pertinent part provides as follows:

> "Upon the filing of any application for increase provided for by section 4909.18 of the Revised Code . . . *the commission shall at once cause an investigation*

to be made of the facts set forth in said application and the exhibits attached thereto, and of the matters connected therewith. Within fifteen days after the filing of such application, or within such additional time as the commission orders, a written report shall be made and filed with the commission, a copy of which shall be sent by registered mail to the applicant, the mayor of any municipal corporation affected by the application, and to such other persons as the commission deems interested. If no objection to such reports is made by any party interested within thirty days after such filing and the mailing of copies thereof, the commission shall fix a date within ten days for the final hearing upon said application, giving notice thereof to all parties interested. At such hearing the commission shall consider the matters set forth in said application and make such order respecting the prayer thereof as to it seems just and reasonable."*

On May 14, 1963, the written report so required, entitled "Case No. 30,311; The East Ohio Gas Company, Cleveland, Ohio, Staff Report of Investigation by The Public Utilities Commission of Ohio," was filed. During the 30-day period following the filing of this statutory report East Ohio and various cities filed objections thereto as permitted by Ohio Rev. Code § 4909.19.

On June 13, 1963, the Ohio Commission issued an entry scheduling the hearing of testimony beginning on July 9, 1963. Public hearings commenced on that date and continued intermittently for some 113 hearing days and involved 11,692 pages of testimony. Four cities (Akron, Canton, Cleveland and Massillon), in addition to East Ohio and attorneys for the Ohio Commission, participated in the hearings. The Ohio Commission presented 6 wit-

---

*Emphasis by way of italics has been supplied throughout.

nesses and 13 exhibits which included the Staff Report and all of its engineers' working papers relating thereto. East Ohio presented 10 witnesses and 72 exhibits. As noted by the Supreme Court of Ohio (Cities' Petition, App. C, p. 64):

> "The length of time consumed by these hearings has been stated. It is observed throughout the record that extreme latitude was granted to counsel for the cities at all times. One company witness was cross-examined for 33 days."

The three Cities also presented numerous witnesses and exhibits. In all the Ohio Commission "received and considered 264 exhibits" (Cities' Petition, App. C, p. 62). Hearings were finally concluded on May 27, 1964.

Thereafter briefs were filed by East Ohio and the participating cities and on November 20, 1964, the Ohio Commission filed its Findings and Order granting East Ohio about half of the increase in revenue it had applied for (Cities' Petition, App. A). East Ohio thereupon filed revised rate schedules designed to yield the increased revenue so fixed and these were approved by the Ohio Commission in its Findings and Order of November 23, 1964 (Cities' Petition, App. B).

The four participating cities filed motions for rehearing with the Ohio Commission as a prerequisite to an appeal to the Supreme Court of Ohio (Ohio Rev. Code § 4903.11), which motions were overruled on January 18, 1965. Thereafter the orders of the Ohio Commission were appealed to the Supreme Court of Ohio, by Akron in one appeal and by the three Cities in another. The Ohio Commission was named as appellee and East Ohio was permitted to intervene. Briefs were filed by the respective parties in both appeals and oral arguments were heard on November 24, 1965. The Supreme Court of Ohio filed its opinion and entered its judgment unanimously affirming the Ohio Commission's Orders on March 23, 1966 (Cities' Petition, App. C).

B. The Valuation Fixed by the Ohio Commission and Approved by the Supreme Court of Ohio

As noted above, Ohio Rev. Code § 4909.19 requires the Ohio Commission to make an investigation of, and file a written report concerning, the matters set forth in an application for increased rates. This written report is commonly known in Ohio as the Staff Report. The required investigation was made during the period commencing on August 1, 1961, and ending with the filing of the report on May 14, 1963. During that almost two-year period various members of the staff of the Ohio Commission participated in the investigation and in the writing of the Report. The Report consisted basically of two sections, accounting and engineering. The accounting section detailed the expenses which East Ohio had incurred and which the staff deemed reasonable during the one-year test period fixed by an order of the Ohio Commission. The engineering section contained the staff's estimate of the statutory valuation of East Ohio's properties which were involved. (PUCO Exs. 2A and 2B, Tr. 1391, 9656; Additional Record of Appellee The East Ohio Gas Company, Volume II—Exhibits, pp. 152-203.) During this period the Chief Engineer of the staff was Mr. Paul R. Hampton. Mr. Hampton left the staff shortly thereafter and was replaced by Mr. Norbert R. Patton.

The evidence before the Ohio Commission consisted of the Staff Report, the testimony and exhibits of various staff members, the testimony and exhibits of East Ohio and the testimony and exhibits presented by the three Cities.

The gravamen of the three Cities' Petition herein is stated at pages 4 and 5 of the Petition as follows:

> "There is a difference of over $114,000,000 between the valuations submitted by the Petitioners through their experts and the unsupported valuation attributed to the phantom Hampton. By choosing the

higher Hampton valuation the Commission deprived the Petitioners of due process of law."

As to the gross valuation, East Ohio's valuation was $499,393,956 and the Staff Report's valuation was $496,031,897 (Additional Record of Appellee The East Ohio Gas Company, Volume II—Exhibits, p. 154). As to this difference the Staff Report had this to say (id. at p. 156):

> "Under the circumstances we believe this degree of agreement indicates that either result should be acceptable."

As to the three Cities' evidence, which presented a gross valuation of $421,970,604, most of the difference in their valuation from East Ohio's valuation and the Staff Report valuation was accounted for by the pipe laying labor cost estimates of City Witness Arnold. His testimony was carefully considered by the Ohio Commission and found unsatisfactory and not in accordance with the Ohio valuation statutes. (Cities' Petition, App. A, pp. 35, 37-38.)

As to the amount of the existing depreciation to be deducted under the Ohio statutes to determine the statutory rate base, East Ohio and the Ohio Commission staff used the results of the inspections of the pipe lines and other properties. The three Cities used actuarial methods to determine what was in effect a reserve for depreciation which under the Ohio law is not the proper method of determining existing depreciation (Cities' Petition, App. A, pp. 40-45).

The final net property valuation fixed by the Ohio Commission was $395,849,042 (id. at p. 46). It followed the Staff Report and the valuation exhibits of staff members in large part, although as to certain properties it followed East Ohio's valuation where it was lower. It was

about $13,500,000 lower than that claimed by East Ohio and supported by extensive testimony on both direct and prolonged cross-examination (id. at p. 30).

As to all this evidence on valuation and the three Cities' claims before the Supreme Court of Ohio that only their valuation should have been the one fixed by the Ohio Commission, that Court said (Cities' Petition, App. C, pp. 65-66):

> "Lumped with these specific objections [rulings on evidence] were arguments that the commission's failure to rely upon the opinions of the cities' experts admitted and/or the commission's exclusion of the opinions of the cities' experts in matters concerning reproduction-cost-new of the inventory and/or the commission's greater reliance upon the report of its own staff or company witnesses in this area somehow amounted to lack of due process. . . .
>
> "The remainder of the appellants' contentions and arguments in this area relate to judgments by the commission in weighing the evidence. This court has repeatedly held that it will not substitute its judgment for that of the commission as to conclusions drawn from evidence, unless the findings and order of the commission are manifestly against the weight of the evidence or there is no evidence. *City of Kenton v. Pub. Util. Comm.*, 3 Ohio St.2d 71, 73. *There is evidence supporting all aspects of the order appealed from and no finding of the commission is against the manifest weight of the evidence.*"

In essence what the three Cities are asking this Court to review is the determination of the Supreme Court of Ohio as to the manifest weight of the evidence. The final valuation adopted by the Ohio Commission was more than supported by East Ohio's evidence, and was not challenged by

competent and credible testimony of the three Cities.* The amount of this valuation as determined by the Ohio Commission on the whole record before it and approved by the Supreme Court of Ohio does not present a federal question.

ARGUMENT

Rather than discuss the only question their Petition might conceivably present, the three Cities claim they were somehow denied due process of law because an ex-member of the Ohio Commission's staff did not attend the hearings. They argue that the former Chief Engineer of the Ohio Commission at the time the Staff Report was prepared, Mr. Hampton, "neither gave any direct testimony nor was made available for cross-examination" (Cities' Petition, p. 4). They refer to Mr. Hampton as a "phantom" (Cities' Petition, pp. 4, 14).

These claims of the Cities are completely unwarranted. It is not true that Mr. Hampton was not "available for cross-examination." The three Cities could have cross-examined Mr. Hampton if they had so desired.

The simple answer to the three Cities' claim is that no one can complain of lack of due process if he does not use the rights accorded him by law to secure and cross-examine witnesses he claims he would like to have cross-examined. E.g. 5 WIGMORE, EVIDENCE § 1371 at 51 (3d ed. 1940). Plainly the three Cities' failure to cross-examine Mr. Hampton was because they simply did not want to do so. Obviously his testimony would have again supported the view expressed in the Staff Report. See page 7, *supra*.

*Under Ohio utility law, as in most states and as before most federal administrative agencies, it is not the duty of the regulatory agency to prove the statutory report to objectors thereto but rather the duty of the objectors to present "credible, authoritative and challenging" evidence in support of their objections (Cities' Petition, App. C, p. 66).

Pursuant to Ohio law, the Staff Report was competent evidence the moment it was introduced (Cities' Petition, App. C, p. 66).

If the three Cities had really wanted to examine Mr. Hampton or any other witnesses* concerning the Staff Report (and under Ohio law such witnesses could have been cross-examined after being called, Ohio Rev. Code § 2317.43 (Uniform Reports as Evidence Act); *cf.* Ohio Rev. Code § 2317.37 (Uniform Composite Reports as Evidence Act)), they had ample opportunity and statutory authority under Ohio law to subpoena them or take their testimony by deposition.

Rule 1.15 of the Code of Rules and Regulations of The Public Utilities Commission of Ohio (1962) provides in material part as follows:

> "Subpoenas requiring the attendance of witnesses from any place in the State of Ohio to the designated place of hearing, for the purpose of taking the testimony of such witnesses orally before one or more members of the Public Utilities Commission, any Attorney Examiner, or by deposition before an officer authorized to take the same, will upon written application of any of the parties with good cause having been shown and subject to relevance and materiality to the issues involved, or upon the order of the Commission directing the taking of such testimony, be issued by any member of the Commission."

Ohio Rev. Code § 4903.04 provides:

> "If a person disobeys an order of the public utilities commission or a public utilities commissioner, or a subpoena, or if a witness refuses to testify to any

*The Cities did cross-examine five members of the Ohio Commission's Staff with respect to the Staff Report.

matter regarding which he may be lawfully interrogated, the court of common pleas of a county or a judge of such court, on application of a commissioner, shall compel obedience by attachment proceedings for contempt, as in the case of disobedience of the requirements of a subpoena issued from such court or a refusal to testify therein. The commission shall also have the powers vested in notaries public to compel witnesses to testify and to produce books and papers."

And Ohio Rev. Code § 4903.06 provides:

"In an investigation, the public utilities commission or *any party to the investigation may cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed for depositions in civil actions in the court of common pleas.*"

Clearly no federal question can be raised in these circumstances. As we have noted, the three Cities really claim that the Ohio Commission should have adopted the valuation evidence offered by the three Cities' witnesses rather than that of its own staff which was more than substantiated by the extensive valuation testimony and exhibits of East Ohio's witnesses.

The fact that the absence of Mr. Hampton can be directly attributable to the Cities' failure to use the processes available to them under Ohio law probably explains the three Cities' failure to comply with Rule 23(f) of this Court which requires petitioners to specify the stage in the proceedings before the Ohio Commission and the Supreme Court of Ohio, the manner in which, and the method in which, the alleged federal question sought to be reviewed was raised and the way in which it was passed upon with pertinent quotations from the record and specific references.

Since the three Cities cannot show that the absence of Mr. Hampton could conceivably have resulted in a denial of due process of law, the question they claim is raised here—whether rate payers in a proceeding in which the state exercises its police powers to set maximum rates which a utility may charge are entitled to due process—is nothing more than an abstract proposition wholly unrelated to the proceedings and orders they seek to have this Court review. In fact, the three Cities were granted the last full measure of due process. As stated by the Supreme Court of Ohio (Cities' Petition, App. C, p. 64):

> "It is observed throughout the record that extreme latitude was granted to counsel for the cities at all times."

As we have also noted, since this abstract proposition was never ruled on by the Supreme Court of Ohio adversely to the contention of the three Cities, no basis for jurisdiction over such a question can be found in 28 U.S.C. § 1257. *E.g. Lynch v. New York ex rel Pierson,* 293 U.S. 52 (1934). Simply stated, no federal question was properly presented and passed upon below and none is raised presently by the three Cities.

We observe in closing that the three Cities' reliance on and quotation of what they term "paragraphs eight through ten of the syllabus" of this Court's decision in *Ohio Bell Tel. Co. v. Public Utilities Commission of Ohio,* 301 U.S. 292 (1937) (Cities' Petition, pp. 13-14), is misplaced and irrelevant. As stated by the three Cities, the Ohio Commission in that case based certain portions of its required valuation of the utility's property on price trends of which it took administrative notice after the close of the hearings. In the present proceedings, where valuations which were adopted by the Commission were based upon trends, the trends used were detailed specifically in the record through-

out the hearings and in many instances were the same trends availed of by the three Cities in their final valuation claims. As noted in the *Ohio Bell* case by Mr. Justice Cardozo (301 U.S. at 302):

> "When price lists or trade journals or even government reports are put in evidence upon a trial, the parties against whom they are offered may see the evidence or hear it and parry its effect."

The Ohio Commission in the proceedings here involved followed exactly the admonition expressed by this Court.

CONCLUSION

For the foregoing reasons, the Cities' Petition should be denied.

Respectfully submitted,

WALTER J. MILDE
1750 Union Commerce Building
Cleveland, Ohio 44115

THOMAS G. RODERICK
1717 East Ninth Street
Cleveland, Ohio 44114

Attorneys for The East Ohio Gas Company

JONES, DAY, COCKLEY & REAVIS
By JAMES E. COURTNEY
1750 Union Commerce Building
Cleveland, Ohio 44115

Of Counsel

July 15, 1966

Office-Supreme Court, U.S.
FILED
AUG 27 1966
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 255.

THE CITIES OF CANTON, CLEVELAND, and MASSILLON, OHIO,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO, and THE EAST OHIO GAS COMPANY,

Respondents.

REPLY BRIEF BY THE PETITIONERS.

BRONIS J. KLEMENTOWICZ,
Director of Law,

JAMES L. HARKINS, JR.,
Assistant Director of Law,
204 City Hall,
601 Lakeside Avenue, N. W.,
Cleveland, Ohio 44114,

HAROLD E. DEHOFF,
City Solicitor of Canton,
City Hall, Canton, Ohio,

VIRGIL MUSSER,
City Solicitor of Massillon,
City Hall, Massillon, Ohio,
Attorneys for Petitioners.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

TABLE OF CONTENTS.

Restatement of the Case 1

The Commission Adopted Hampton's Valuation .. 2

The Valuation Adopted by the Commission Is Based Upon Many Engineering Judgments .. 3

Hampton Is a Complete Stranger to the Record of This Case 3

The Commission Utilized the Hampton Valuation as Its Justification For Increasing the Company's Rates 4

Argument 5

I. A Federal Question Has Been Raised 5

The Petitioners Have Been Denied Due Process of Law 5

The Ratepayer Should Not Be Required to Search the World for Commission Witnesses 6

II. The Cities Are Entitled to Due Process of Law .. 7

As Representatives of the Ratepayer 7

We Should Be Able to Protect Our Own Corporate Interests 7

III. The Cities Have Followed Rule 23(F) 8

Conclusion 10

TABLE OF AUTHORITIES.

Cases.

Mountain Timber Co. v. Washington, 243 U. S. 219 (1917) ---------- 6

Near v. Minnesota, 283 U. S. 697 (1931) ---------- 6

Ohio Bell Telephone Company v. Commission, 301 U. S. 292 ---------- 6

Constitution.

Constitution of the United States, Fourteenth Amendment ---------- 6, 7

Rules.

Rule 23 (F) of the Supreme Court of the United States ---------- 8

In the Supreme Court of the United States

OCTOBER TERM, 1966.

No. 255.

THE CITIES OF CANTON, CLEVELAND, and MASSILLON, OHIO,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO, and THE EAST OHIO GAS COMPANY,

Respondents.

REPLY BRIEF BY THE PETITIONERS.

RESTATEMENT OF THE CASE.

The East Ohio Gas Company has tried to complicate the very simple issue presented in our petition by stating many irrelevant facts sprinkled with an assortment of partial truths. It is true that this was a very long and complicated case. It had to be. This case involved the valuation of an enormous array of property on a present-day basis.

Out of all the issues involved in this case the petitioners ask this Court to consider only one: *Are ratepayers entitled to due process of law in the setting of rates by state regulatory bodies?* This rather simple issue is based upon only a few facts:

1. The Public Utilities Commission of Ohio (hereinafter referred to as the "Commission") adopted a property valuation of The East Ohio Gas Company which was attributed to a Mr. Paul Hampton.

2. The valuation adopted by the Commission was the result of many engineering judgments by Mr. Hampton.

3. The phantom Mr. Hampton neither gave any direct testimony nor was made available for cross-examination.

4. The Commission utilized the valuation in question as the basis for increasing the rates of The East Ohio Gas Company (hereinafter referred to as the "Company").

The Commission Adopted Hampton's Valuation.

The Commission has clearly adopted the valuation attributed to Mr. Hampton. On page 20 of the Commission's decision (Cities' Petition, App. A, page 45) the Commission very clearly shows that, except for one minor adjustment, it adopted the valuation contained in Commission Exhibit 4 as shown below:

"COMMISSION'S EXHIBIT 4.

	R. C. N.	Existing Depreciation	R. C. N. D.
	$496,031,897	$99,800,080	$396,231,817
Adjustment	454,491	71,716	382,775
	$495,577,406	$99,728,364	$395,849,042

The Commission finds the reproduction cost new less existing depreciation to be $395,849,042."

Commission Exhibit 4 is in turn an abstract of the valuations contained in Exhibit II-A (Tr. 9049). Exhibit II-A is the engineering section of the staff report which has been attributed to a Mr. Hampton (Tr. 9028). *The Commission* (except for one relatively minor adjustment) as indicated above *has adopted dollar for dollar the valuation*

attributed to Mr. Hampton. The implications to the contrary are a deliberate attempt to cloud the issues.

The Valuation Adopted by the Commission Is Based Upon Many Engineering Judgments.

Just about every conceivable kind of property is involved in this case: meters, record players, vehicles, ping pong tables, 60,000,000 feet of varying sizes and kinds of pipe, beds, percolators, gas-masks, sand urns, tools, practically every kind of electronic equipment, etc. It should be self-evident that an enormous number of judgments would be involved in valuing such property on the basis employed in this case: reproduction cost new less existing depreciation. Pages 5 through 7 of our Petition contain numerous citations from the transcript illustrating the fact that the valuation adopted by the Commission was completely dependent upon many engineering judgments by Hampton.

Hampton Is a Complete Stranger to the Record of This Case.

Canton, Cleveland, and Massillon, stated in their Petition (page 4 et seq.) that Mr. Hampton neither gave any direct testimony nor was made available for cross-examination. *Neither one of the respondents could point* in their briefs to a single place in the record *where Mr. Hampton either gave any direct testimony or was made available for cross-examination.*

The petitioners throughout the proceedings made it known that they wished to cross-examine whoever prepared the valuations adopted by the Commission. Early in the proceedings the petitioners through the Law Director of Cleveland made it very clear that they would

object to the introduction of the Staff Report unless those who prepared it were made available for cross-examination (Tr. 1028—contained on page 59 of the petitioners reply brief before the Supreme Court of Ohio). As shown on pages 9-11 of our petition, we objected to the admission into evidence of both the "Engineering Report" of the Staff Report and the workpapers attributed to Mr. Hampton (Tr. 9643-50). The petitioners also objected to Commission Exhibit 4 (Tr. 9643-50), which, as previously shown, is nothing more than an abstract from the Staff Report.

The Commission Utilized the Hampton Valuation as Its Justification For Increasing the Company's Rates.

As previously shown the Commission adopted the Hampton valuation of $396,231,817 and after an adjustment of $382,775 arrived at a rate base of $395,849,042. The Commission then added $15,899,118 to the rate base as an allowance for working capital to arrive at a total rate base of $411,718,160 (page 20 of the Commission's decision, which is in Appendix A, page 46 of our petition).

The Commission applied a rate of return of 6.25% to the rate base of $411,718,160 and determined that the Company was entitled to a return of $25,732,385 (page 24 of the Commission's decision, which is in Appendix A, page 53 of our petition). The Commission then determined that it was necessary to increase charges to residential and commercial consumers by $17,975,181 per year and that it was necessary to increase charges to industrial consumers by $955,468 in order to enable the Company to earn a return of $25,732,385 (pages 24-5 of the Commission's decision, which is in Appendix A, pages 53-5 of our petition).

ARGUMENT.

I.

A FEDERAL QUESTION HAS BEEN RAISED.

The Petitioners Have Been Denied Due Process of Law.

No amount of presenting evidence or of other effort upon the part of the Cities of Canton, Cleveland, and Massillon could ever contest a mute compilation of figures. No amount of evidence or other effort upon the part of Canton, Cleveland, and Massillon could ever determine the basis for the judgments inherent in the Hampton valuation. It is the testimony of the expert who prepares such a compilation that gives it concrete mass and cognitive form. It is only after the expert's direct testimony and cross-examination that a target is created, which can be exploded by rebuttal evidence and by brief.

If the Staff Reports of the Commission are valid evidence of property valuations and those who prepare them do not have either to give direct testimony or to be made available for cross-examination, then no Staff Report will ever be subject to impeachment. All such valuations would be perfect in the sense that, except for simple errors in arithmetic, no defect could ever be detected. Such a position would enable the Commission to justify any valuation or rate that it might choose. No valuation submitted by any party challenging a Staff Report could ever hope to attain a greater accuracy or validity than that which would be granted to the Staff Report. Under such circumstances no ratepayer could ever have a chance to protect himself against excessive valuations which result in excessive rates. Such a position would make the Commission's rate hearings into vacuous exercises for both the ratepaper and the utility.

This Court has determined that utilities are entitled to the protection of the Fourteenth Amendment to our Federal Constitution against arbitrary action on the part of the Commission in the valuation of utility property (*Ohio Bell Telephone Company v. Commission*, 301 U. S. 292). The Cities of Canton, Cleveland, and Massillon now seek the same protection for the ratepayer. *We seek equality of treatment.*

The Ratepayer Should Not be Required to Search the World for Commission Witnesses.

The Company has advanced the novel doctrine that the Cities of Canton, Cleveland, and Massillon were required under Ohio law to seek out and find Mr. Hampton, upon whom the respondents have so heavily relied but have never presented. Such a precept would be completely foreign to the nature of these adversary proceedings or, for that matter, to any system of legal procedure that we know of anywhere else in our country.

This Court has long held that whether state law actually deprives a party of his rights secured by the Constitution depends upon the law's practical application and effect (*Near v. Minnesota*, 283 U. S. 697, 708 (1931); *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237 (1917)). There is only one recognized way in which our right to cross-examine Mr. Hampton could have been satisfied: Counsel for the Commission should have offered Mr. Hampton for cross-examination at the Commission hearings.

The right of cross-examination is fundamental to a fair hearing. Without it any hearing is a farce. The Petitioners have been denied due process of law.

II.

THE CITIES ARE ENTITLED TO DUE PROCESS OF LAW.

As Representatives of the Ratepayer.

By some strange twist of logic both respondents argue that the ratepayer is not entitled to due process of law, since to give the ratepayer due process of law would somehow deny the utilities due process of law. The respondents then argue that the municipalities as representatives of the ratepayer are not entitled to claim due process of law.

The respondents attempt to justify their position by imagining a chamber of horrors where every one of the Company's 800,000 customers would leave his home, journey to Columbus, and demand one full day's hearing time, if he were entitled to due process of law. This is nonsense. The very best way to protect the ratepayer and to bypass the nightmares envisioned by the respondents is to permit the municipalities to represent their ratepayers. Such a procedure gives the ratepayer the best protection possible, since, normally, only the municipalities have the resources to effectively represent and protect his interests.

We Should Be Able to Protect Our Own Corporate Interests.

The respondents also argue that an Ohio utility corporation is entitled to the protection of the Fourteenth Amendment, while the ratepayer is not.

It is no secret to this Court that the various states have often been unfair to their great urban centers. It would be a terrible matter, if our cities, in their efforts to meet the pressing and perplexing problems of both the present and the future, were handicapped by being powerless to protect themselves against arbitrary state action.

III.

THE CITIES HAVE FOLLOWED RULE 23(F).

The Company has stated that the petitioners have failed to follow rule 23 (F) of this Court. The petitioners have shown on pages 4 through 5 of our petition that the ratepayer was denied due process of law by the Commission's adoption of the valuation attributed to Mr. Hampton in its "Findings and Order" of November 20, 1964. We showed on pages 9 through 11 of our petition that we made timely objections to the admission into evidence of the Hampton valuation (Tr. 9643-50). The Cities expounded at great length on their objections to the admission into evidence of the Hampton valuation.

The Cities of Canton, Cleveland, and Massillon, out of consideration for the Court's admonition that we be as brief as possible, fulfilled the remainder of the statements required by rule 23 (F) by noting on page 11 of our petition that we pointed out to the Commission this denial of due process of law in our "Petition of the Cities of Canton, Cleveland, and Massillon for Reopening, Rehearing, and Reconsideration" and that this error had been cited in our notice of appeal to the Supreme Court of Ohio. The Petitioners also stated that this error was argued at great length in our briefs before the Supreme Court of Ohio.

Errors 34, 35, 99, 100, and 102, which were listed on pages 7, 8 and 27, of the "Petition of the Cities of Canton, Cleveland, and Massillon, for Reopening, Rehearing, and Reconsideration" before the Commission, were as follows:

> "34. This Commission's rate base findings were predicated upon conclusions contained in the "Engineering Report" of the staff of this Commission which was purported to have been prepared by Mr. Hampton and other Commission employees, the precise identity of whom are unknown to the record, none of whom are either presented as witnesses or available for cross-examination."

"35. Through the acceptance by this Commission of the engineering valuations allegedly made by Mr. Hampton and others, who were not available for cross-examination, the Cities were denied both substantive and procedural due process of law."

"99. This Commission erred by failing to sustain the objections raised on pages 9643-50 of the record to the admission of Commission Exhibit 2-A. This Commission further erred by failing to sustain the motion to strike said exhibit made on page 11,668 of the record."

"100. This Commission erred by failing to sustain the objections raised on pages 9643-50 of the record to the admission of Commission Exhibit 2-B. This Commission further erred by failing to sustain the motion to strike said exhibit made on page 11,668 of the record."

"102. This Commission erred by failing to sustain the objections raised on pages 9643-50 of the record to the admission of Commission Exhibit 4. This Commission further erred by failing to sustain the motion to strike said exhibit made on page 11,668 of the record."

Errors 37, 38, 97, 98, and 100, contained on pages 14, 15, and 32 of the "Notice of Appeal by the Cities of Canton, Cleveland, and Massillon," before the Supreme Court of Ohio, are respectively almost identical to errors 34, 35, 99, 100, and 102 of our "Petition of the Cities of Canton, Cleveland, and Massillon for Reopening, Rehearing, and Reconsideration."

The subject matter of the above errors was discussed on pages 15 through 19 of our "Brief of the Cities of Canton, Cleveland, and Massillon" before the Supreme Court of Ohio. On pages 18-19 of our brief we argued:

"In reality the Cities were denied the right to cross-examine anyone about the valuation adopted by the

Commission. There is no real difference between making available witnesses who know nothing about the valuation in question and actually presenting no witnesses at all. In either event, the Cities were denied an opportunity to make an effective cross-examination. The Commission would not have acted any more arbitrarily if it had gone completely outside of the record to adopt some other valuation, as it did in *Ohio Bell Telephone Company v. P. U. C. O.*, 301 U. S. 292, 57 S. Ct. 724 (1937)."

"* * * The Commission's decision to adopt the valuation attributed to Mr. Hampton was arbitrary, capricious, and unlawful and was a denial to the Cities of due process of law under both the Constitution of Ohio and the Fourteenth Amendment to the Federal Constitution."

The conclusion to our reply brief before the Supreme Court of Ohio contained the following argument:

"There is no virtual difference between adopting a valuation predicated upon a valuation attributed to the phantom Hampton that is supposedly based in large part upon published trend factors which in turn are beyond any opportunity for impeachment as in the instant case and just taking administrative notice of other published trend factors after the case had been submitted as in the Bell case. Both procedures lack '* * * the rudiments of fair play assured to every litigant by the Fourteenth Amendment as a minimal requirement * * *' (Tenth paragraph of the Syllabus of the *Bell* case)."

CONCLUSION.

The petitioners had no more opportunity to parry the Hampton valuation under the circumstances of this case than we would have had, if we had been told to parry the wind with a foil. Counsel for the Commission in this and other cases have openly contended on behalf of the Com-

mission that the ratepayer is not entitled to due process of law.

The Supreme Court of Ohio has closed its eyes to the problem of the ratepayer trying to receive the minimum of due process from the Commission. Indeed, the Supreme Court of Ohio seems also to have taken the position that the ratepayer is not entitled to due process of law, for it has ruled that "* * * the staff report does not need 'testimonial support' as the Cities contend." (Appendix C, page 66 of our petition.)

The plight of the Ohio ratepayer is a most desperate one. There is no hope for him under Ohio law.

WHEREFORE, the petitioners pray that a writ of certiorari directed to the Supreme Court of the State of Ohio may issue under the seal of this Honorable Court in this cause and that upon such review the judgment of the Supreme Court of Ohio, entered on March 23, 1966, and the "Findings and Order" of the Commission of November 20, 1964, be vacated, reversed, and set aside and that this case be remanded to the Supreme Court of Ohio with instructions to proceed in accordance with the rulings of this Court.

Respectfully submitted,

BRONIS J. KLEMENTOWICZ,
Director of Law of Cleveland,
City Hall, Cleveland, Ohio,

JAMES L. HARKINS, JR.,
Assistant Director of Law,
City Hall, Cleveland, Ohio,

HAROLD E. DEHOFF,
City Solicitor of Canton,
City Hall, Canton, Ohio,

VIRGIL MUSSER,
City Solicitor of Massillon,
City Hall, Massillon, Ohio,
Attorneys for Petitioners.